

DECIDING SOCIAL SECURITY CLAIMS:  
A STUDY IN THE THEORY AND PRACTICE OF  
ADMINISTRATIVE JUSTICE

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Ph. D  
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February 1988



I declare that this thesis has been composed by myself  
and that the work is my own



To Claire

"Not even the apparently enlightened principle of 'the greatest good for the greatest number' can excuse indifference to individual suffering. There is no test for progress other than its impact on the individual."

Aneurin Bevan  
*In Place of Fear*

## ABSTRACT

The thesis examines the relationship between individual citizens and an administrative agency of the state, the Department of Health and Social Security. Drawing on a definition of administrative justice as "... those qualities of a decision process that provide arguments for the acceptability of its decisions" (Mashaw, 'Bureaucratic Justice', 1983), an analytical framework is developed which serves not only a descriptive, but also an evaluative and normative function. The argument is made that administrative justice fundamentally comprises the elements of accuracy and fairness (fairness itself comprising the elements of promptness, impartiality, participation and accountability). An analysis of a generalised notion of decision-making, as the combination of information (or evidence) collection and the application of a set of 'decision criteria', is presented. Three types of 'decision criteria' frequently used within a framework of statutory legal rules in the provision of welfare services, ie case-law, administrative rules and professional knowledge, are used as the bases for three ideal-type decision-making systems.

The empirical part of the thesis utilises this analytical framework in an examination of the administration by the Department of Health and Social Security of two social security benefits, industrial disablement benefit and mobility allowance. This choice of benefits allows comparisons to be made between the diverse organisational arrangements adopted for each of them, and between the parallel systems of adjudication used for the deliberation of the separate lay and medical questions which form their eligibility criteria. A number of possible reforms which would enhance the achievement of administrative justice in relation to the social security system in general, and to the administration of industrial disablement benefit and mobility allowance in particular, emerge from the empirical analysis.

The thesis concludes with a reappraisal and confirmation of the validity of the theoretical development of administrative justice which has been presented, and of its utility as an analytical tool for evaluating current and prospective arrangements for administering social security. The suggestion is made finally that the relevance and usefulness of administrative justice should extend beyond social security not only into other areas of public administration, but also to the private sphere in the relationships between individual citizens and organisations of the private sector.

## CONTENTS

Acknowledgments	xii
List of Tables	xiv
List of Figures	xv
Glossary of Abbreviations	xvi

### CHAPTER 1 -ADVANCING THE FRONT LINE: A RATIONALE FOR STUDYING ROUTINE DECISION-MAKING

1	Introduction	1
2	Social security and the scope of academic research	2
3	The paucity of social research at the 'front line' of social security	6
4	Why studying the front line is important	9
5	The need for theory	12
6	Necessary diffidence: avoiding the lure of over-ambitious generalisations	14
7	The structure of the thesis	16

### CHAPTER 2 - ADMINISTRATIVE JUSTICE AND WELFARE DECISION-MAKING

	Part I - Introduction	20
	Part II - Mashaw and Administrative Justice	23
1	The Mashaw Thesis	23
	(a) Bureaucratic Rationality	25
	(b) Professional Treatment	25
	(c) Moral Judgement	26
	(d) The models compared	27
2	Defining administrative justice	30
	(a) Probing Mashaw's definition of administrative justice	30
	(b) For whom must the decision process be acceptable?	31

3	A Critique of Mashaw	33
	(a) Examining the 'justice arguments'	34
	Efficiency	35
	Accuracy	36
	Service	37
	Fairness	38
	(b) Distilling the essence of administrative justice	39
	(c) The contribution of 'organisation' and 'cognitive technique'	39
	(d) Résumé	41

### **Part III - Decision-making Processes; Decision-making Systems** 42

1	Decision-making processes	42
	(a) The nature of decision-making	43
	(b) A typology of decision criteria	44
	(c) Formal decision criteria: rules and professional knowledge	46
	(c) Informal decision criteria: value systems	48
2	Decision-making systems	48

### **Part IV - Administrative Justice Revisited** 52

1	Accuracy	53
2	Fairness	55
	(a) Promptness	56
	(b) Impartiality	57
	(c) Participation	58
	(d) Accountability	59

### **Part V - Sources of Uncertainty in Welfare Decision-making** 62

1	Decision criteria at the macro level of a welfare service	62
2	Discretion: the inevitability of making choices	66
3	Decision criteria and choice at the micro level of individual decisions	70
4	Summary	73

### **Part VI - Conclusion** 74

## **CHAPTER 3 - AN INTRODUCTION TO SOCIAL SECURITY DECISION-MAKING**

### **Part I - Introduction** 76

### **Part II - The Adjudication System** 78

1	Lay Adjudication	79
	(a) The adjudication officer	79
	(b) The Social Security Appeal Tribunal	80

(c) The Social Security Commissioners	80
2 Medical Adjudication	81
(a) The Adjudicating Medical Practitioner	81
(b) The Medical Appeal Tribunal	82
(c) The Social Security Commissioners	82
3 The Office of the Chief Adjudication Officer	82
4 The Office of the President Of Social Security Appeal Tribunals and Medical Appeal Tribunals	84
5 The Role of the Secretary of State in Decision-making	85

### **Part III - The Organisation of the DHSS** 87

1 The Local Office	88
2 The Regional Office	90
3 The Central Offices	92
4 DHSS Headquarters	92

### **Part IV - Social Security Decision-making and Administrative Justice** 93

1 The Meaning of Adjudication	93
2 The Demands of Administrative Justice	97
(a) Accuracy	97
(b) Fairness	101
Promptness	101
Impartiality	103
Participation	106
Accountability	107

### **Part IV - Summary** 108

## **CHAPTER 4 - METHODOLOGY**

### **Part I - Introduction** 109

### **Part II - The Strategy for Data Collection** 113

### **Part III - From Broad Strategy to Detail: Asking the Right People the Right Questions** 119

1 The interview samples	119
(a) Who to interview	119
(b) How many and where	121
(c) The local office sample	122
(d) The Regional and Central Offices sample	125
(e) The medical sample	126
(f) The sample: a summary	127

2	Details of data collection	128
	(a) Interviews	128
	(b) Casepapers	129
3	Postscript: a note on the conduct of field visits	130
	<b>Part IV - Analysis: Making Sense of the Data</b>	133
	<b>Part V - Conclusion</b>	136

## **CHAPTER 5 INDUSTRIAL DISABLEMENT BENEFIT**

	<b>Part I - Background</b>	137
1	The Evolution of the Industrial Injuries Scheme	137
2	The Legislation	141
3	Some Illustrative Statistics	147
4	The Distribution of Decision-making within the DHSS	151
	<b>Part II - The Theory and Practice of Disablement Benefit Decision-making</b>	152
1	The Formal Arrangements	152
	(a) The Claiming Process	155
2	Decision-making in Practice - the lay questions	158
	(a) Industrial Accidents	158
	(b) Prescribed Diseases and Injuries	163
	Occupational Deafness	163
	Wider problems of evidence on prescribed diseases	165
	(c) Special Hardship Allowance	167
	(d) Summary	171
3	Decision-making in Practice - the medical questions	173
4	Organisational Effects	179
	(a) The view from the top	179
	(b) The effect at the bottom	180
	(c) Supervisory adjudication officer or adjudicatory supervisor?	182
	(d) Disablement Benefit as poor relation	183
	(e) Expertise versus career development	184
	<b>Part III - The Demands of Administrative Justice</b>	185
1	Administrative justice and lay adjudication	185
	(a) Accuracy	185
	The official view	185
	The problem of defining accuracy	191
	Training	193
	Advice	196

Monitoring	200
Social Security Appeals Tribunals	204
(b) Fairness	206
Promptness	206
Impartiality	207
Participation	212
Accountability	213
3 Administrative Justice and Medical Adjudication	218
(a) Accuracy	218
Training	221
Advice	222
Monitoring	224
Medical Appeal Tribunals	226
Promoting accuracy - a summary	227
(b) Fairness	228
 Part IV - Discussion and Conclusion	 231
1 The lay decision-makers	231
(a) The complex task of routine decision-making	231
(b) Administrative justice and industrial disablement benefit	233
2 The medical decision-makers	236
3 Conclusion	237

## CHAPTER 6 - MOBILITY ALLOWANCE

 Part I - Background	 239
1 The Origins of Mobility Allowance	239
2 The Legislation	243
3 Some Illustrative Statistics	246
4 The Mobility Allowance Unit	250
 Part II - The Theory and Practice of Mobility Allowance Decision-making	  252
1 The Formal Arrangements	252
(a) The Claiming Process	254
2 Decision-making in Practice - the medical questions	257
(b) The medical examination	257
(c) Lay Scrutiny	264
3 Decision-making in Practice - the lay questions	267
 Part III - The Demands of Administrative Justice	 269
1 Accuracy	269
(a) The official verdict	269
(b) An alternative analysis	271



(c) The emergence of non-legal decision criteria	276
(d) Promoting accuracy in the decision-making system	279
Training	279
Advice	281
Monitoring	282
The Tribunal System	283
2 Fairness	285
(a) Promptness	285
(b) Impartiality	287
(c) Participation	291
(d) Accountability	294
<b>Part IV - Discussion and Conclusion</b>	<b>298</b>
1 Mobility Allowance and the Adjudication System	298
(a) Will the real decision-makers please stand up	299
(b) The status of 'opinions' within the adjudication system	300
(c) Advice and monitoring loopholes	301
(d) The medical board in no-man's land	301
2 Conclusion	302

## **CHAPTER 7 - ADMINISTRATIVE JUSTICE: CHIMERA OR SUBSTANCE?**

Part I - Introduction	304
<b>Part II - The Verdict on Practice</b>	<b>307</b>
1 The Social Security Administration System	307
(a) The Doublelife of the Adjudication Officer/Supervisor	308
(b) Medical Adjudication	311
(c) The Advice and Monitoring Network	313
(d) The Tribunal System and the Front Line	315
(e) Organisational Effects	316
2 Industrial Disablement Benefit and Mobility Allowance	
Decision-making	321
(a) Industrial Disablement Benefit	321
(b) Mobility Allowance	322
<b>Part III - The Contribution to Theory</b>	<b>325</b>
1 The Validity of Administrative Justice	325
2 Problems with Administrative Justice	327
(a) Administrative Justice and 'Efficiency'	327
(b) The Qualitative Nature of Administrative Justice	329
<b>Part IV - Final Comments: Pursuing the Subtle Enterprise</b>	<b>332</b>

Notes	335
References and Bibliography	358
Appendix - Interview Schedules	372

ACKNOWLEDGMENTS

Part of the mythology of researching and writing a Ph.D is that it is an isolated and solitary endeavour. There are no doubt times when this is indeed true, but a glance at an honest and comprehensive acknowledgments page of any completed thesis will reveal that, for a solitary exercise, an awful lot of people seem to get involved. And in the course of preparing this thesis there are many people to whom I owe a debt of gratitude.

Throughout the three and a half years of the project, the unfailing encouragement, advice and assistance of my two supervisors, Mr Michael Adler and Professor Tony Bradley, have been invaluable. Whilst I take full responsibility for the content of the thesis, its final version has gained immensely from their innumerable constructive criticisms. Along the way I have also received useful criticisms on specific areas of the work from Hazel Houghton, Helen Bolderson and Dr Brian Longhurst - my thanks to them.

Of course, without the co-operation and assistance of the DHSS, the study could never have been undertaken. My thanks, therefore, are extended, firstly, to all those officials of the Department who facilitated the administrative arrangements of the fieldwork, and secondly, to those officials in the local offices, the Regional Offices, the Mobility Allowance Unit, The Medical Boarding Centres, the Office of the Chief Adjudication Officer, the Nottingham Training Centre, and HQ in London who allowed me to question them at length, and from whom I received nothing but courtesy and co-operation. I also acknowledge gratefully the award of a postgraduate grant by the Economic and Social Research Council.

I am also extremely grateful for the support and encouragement of numerous family and friends, particularly those who have fed and housed me on my various excursions around Scotland and England. My parents deserve special mention for their generosity at all times, and particularly for help with the purchase of a wordprocessor. Two further individuals deserve thanks. Firstly, Valerie Chuter for her indefatigable cheering from the sidelines. And finally, Claire McNamara whose constant help and support should really warrant an acknowledgments page of their own.

LIST OF TABLES

3.1	Social Security staff working in Local, Regional and Central Offices	87
4.1	The local offices in the study	123
4.2	Interview respondents from the local offices	124
4.3	Interview respondents from the Regional Offices	125
4.4	Interview respondents from the Mobility Allowance Unit	125
4.4	The complete sample	127
5.1	Number of industrial disablement benefit assessments made per year	147
5.2	Number of disability pensions current at 30th September	148
5.3	Special hardship allowances current at 30th September	149
5.4	Illustrative local office workloads for the six months August 1985 to January 1986	150
5.5	OCAO analysis of industrial injuries decisions 1984/85	186
5.6	OCAO analysis of industrial injuries decisions 1985/86	186
5.7	Analysis of comments raised on industrial injuries decisions (excluding 'technical deficiencies') 1984/5 and 1985/6	187
5.8	Analysis of industrial accidents, disablement benefit, and special hardship allowance in local offices	189
5.9	Summary of Table 5.8	189
5.10	Local office workloads and comment rates	190
6.1	Number of current mobility allowance recipients at 31st December	246
6.2	Success and failure rates of mobility allowance claimants 1976-1986	247
6.3	Number of disallowances per year by reason for disallowance 1976-1986	248
6.4	Disallowances as a percentage of total disallowances 1976-1986	249
6.5	Cases referred to Medical Boards and MATs 1980-1985	254
6.6	OCAO analysis of mobility allowance adjudication decisions	270

LIST OF FIGURES

2.1	Mashaw's models of administrative justice	28
2.2	The legal model of a decision-making system	49
2.3	The administrative model of a decision-making system	50
2.4	The professional model of a decision-making system	51
2.5	The welfare system 'doughnut'	63
2.6	The welfare system: the layers of decision criteria	64
2.7	The place of discretion within the welfare system	65
2.8	The interaction between the decision criteria and evidence in the decision-making process	71
3.1	The social security adjudication system	79
3.2	The organisation of the CB side of a local office	89
3.3	The organisation of a DHSS Regional Office	91
3.4	A simplified representation of the social security decision-making process	95
5.1	The industrial disablement benefit and special hardship allowance decision-making processes	157
6.1	The mobility allowance decision-making process	256
7.1	The relationship between organisation and administrative justice	317

GLOSSARY OF ABBREVIATIONS

AMP	Adjudicating Medical Practitioner
AO	Adjudication Officer
AOG	Adjudication Officer's Guide
CAO	Chief Adjudication Officer
CB	Contributory Benefits
CIO	Chief Insurance Officer
CO	Clerical officer
DHSS	Department of Health and Social Security
DIP	Disability Insurance Program
Dis. Ben.	(Industrial) Disablement Benefit
EMP	Examining Medical Practitioner
EO	Executive Officer
HASSASSA Act	Health and Social Services and Social Security Adjudications Act 1983
HEO	Higher Executive Officer
HEO/AO	Higher Executive Officer/Adjudication Officer
IAC	Initial Adjudication Course
IDB	Industrial Disablement Benefit
II	Industrial Injuries
IIAC	Industrial Injuries Advisory Committee
ILO	Integrated Local Office
IO	Insurance Officer
IOG	Insurance Officer's Guide
LIO	Local Insurance Officer (now Adjudication Officer)
LO	Local Office
LTB	Long Term Benefits
MAT	Medical Appeal Tribunal
MBC	Medical Boarding Centre
MO	Medical Officer
NFCO	North Fylde Central Office
NHS	National Health Service
NI	National Insurance
NILT	National Insurance Local Tribunal
OCAO	Office of the Chief Adjudication Officer
OPSSAT	Office of the President of SSATs and MATs
PAO	Principal Adjudication Officer
PMO	Principal Medical Officer
RDC	Regional Disablement Centre
RIO	Regional Insurance Officer
RO	Regional Office
SBAT	Supplementary Benefit Appeal Tribunal
SDA	Severe Disablement Allowance
SHA	Special Hardship Allowance
SMO	Senior Medical Officer
SSA	Social Security Administration
SSAT	Social Security Appeal Tribunal
SSP	Statutory Sick Pay
STB	Short Term Benefits
UB	Unemployment Benefit

CHAPTER 1 - ADVANCING THE FRONT LINE: A RATIONALE FOR STUDYING ROUTINE  
DECISION-MAKING

1 - Introduction

"... structuring and controlling a system of administrative action that can also claim to provide 'justice' is a very subtle enterprise."

(J.L. Mashaw, 1983, p.17)

This study was prompted by a simple question: within the vast, bureaucratic edifice of the Department of Health and Social Security (DHSS) how are individual decisions made on claims for social security<sup>(1)</sup> benefits? However, an answer which merely described how decisions are made, edifying though this might be, would be of only limited value in the context of a social security system that is constantly subject to change in both its substantive content and its methods of administration. Of greater long-term relevance would be an analysis which also considered how, in general, decisions ought to be made, an approach which demands the use of normative theorising. In response, this thesis develops a normative framework around the concept of administrative justice, and uses it as an analytical tool in an empirical evaluation of the performance of the DHSS in its administration of two specific social security benefits: industrial disablement benefit (IDB), intended for those who are injured or who contract certain prescribed diseases at work, and mobility allowance, intended to compensate people whose physical disability limits their ability to walk.

The study of decision-making within the DHSS, as the brief review of social security research will show later, has attracted comparatively little in the way of academic interest in this country. However, in this introductory chapter I will argue that, given the size and scope of the social security system, such a study is both necessary and



important. The chapter continues by arguing the need for a normative framework within which to conduct an analysis of social security administration, and concludes with an outline of the structure of the remainder of the thesis.

## 2 - Social security and the scope of academic research

Social security is important. At any one time virtually everyone in the country is in contact with the system in some way, either as a direct recipient (for example, of a retirement pension, or unemployment benefit), as an indirect beneficiary (for example, a child whose parent receives child benefit) or as a contributor to the Exchequer and the National Insurance Fund (which between them finance the payment of benefits) through the tax and national insurance systems. It is one of the earliest of social welfare provisions to have been extensively enshrined in legislation<sup>(2)</sup> this century and formed one of the pillars of the putative "Welfare State" created by the post-war Labour Government to deal with what Beveridge identified as "the giant of Want".<sup>(3)</sup>

A cursory glance at the size and scope of the system can only partly convey its pervasiveness in the modern state. Social Security is the main instrument of social policy through which the problem of poverty is addressed; the 30+ distinct benefits catering for contingencies such as unemployment, sickness, maternity and disability, for the inevitability of old age and death, and for the burdens imposed by raising a family. In 1984/5<sup>(4)</sup> the total amount dispensed in benefits was approximately £38 billion (about £100 million every day) representing 30% of all public expenditure. Sixteen million new claims were dealt, with drawing where necessary on the 52 million records maintained at the DHSS's Central Office in Newcastle. About 115,000 officials administered the system, of whom over 80,000 were civil servants of the DHSS. At any one time over 9 million people

were receiving a retirement pension, over 1 million unemployment benefit, 4½ million supplementary benefit, nearly 7 million families were collecting child benefit in respect of 12½ million children, and just under 5 million were receiving either a rent rebate or allowance under the housing benefit provisions.

As these statistics demonstrate, social security is important not only for the individual recipients of benefit payments, which for many people will be their main or sole source of income, but also for the government which must finance the system from the limited resources available in the public expenditure budget.

Despite its importance social security has remained something of a poor relation in the academic study of social policy in this country. This is not to deny a large body of scholarship on the subject (see O'Higgins & Partington, 1986), some of which will be noted later, but the contrast with other areas of social policy is quite stark; while institutes, research centres and university appointments in, for example, health, education and housing policy and practice abound, one would search the British academic landscape in vain for a Social Security Research Unit, or a chair in Social Security.

Although a poor relation of some other areas of social policy, aspects of social security have attracted consistent interest and generated a healthy literature. The history and development of social security policy have been explored by, inter alia, Gilbert, 1966; Fraser, 1973; and Ogus, 1982; whilst the evolution of schemes of social assistance, ie National Assistance and its successor, supplementary benefit, has attracted even greater interest from, for example, Webb, 1975; Deacon and Bradshaw, 1983; Walker, 1983; Donnison, 1982; and Beltram, 1984. And continuing in this tradition, the latest incarnation of social assistance, Income Support (and the Social Fund) has already generated its own corpus of study in advance of its implementation in April 1988 (see, for example, Berthoud, 1985; Partington, 1986; Bradshaw, 1987).

However, the amount of empirical research on social security is far more modest (Adler, 1985). Furthermore, much of this has understandably concentrated on the impact of social security on the financial circumstances of specific groups of the population, and on the labour market. <sup>(5)</sup>

A large proportion of empirical research has been devoted to the examining the mechanisms for the resolution of disputes between claimants and the DHSS within the social security appeals network. This comprises the Social Security Appeal Tribunal (SSAT) system (which in 1984 subsumed the previously separate systems of Supplementary Benefit Appeal Tribunals (SBATs), and National Insurance Local Tribunals (NILTs)), and the Medical Appeal Tribunal (MAT) system.

A major study of the operation of NILTs was carried out in the 1970s (Bell et al, 1974, 1975a). It recommended, inter alia, the provision of more advisory and representation facilities for appellants, and advocated the need for more competent and better trained tribunal members. In contrast, the SBAT system generated a large literature, much of it critical. <sup>(6)</sup> Criticisms <sup>(7)</sup> included structural weaknesses and the ambiguous relationship between SBATs and the DHSS (Herman, 1972), 'grossly inadequate' decision-making (Lewis, 1973), and the failure of SBATs to meet the Franks Committee criteria of openness, fairness and impartiality (Lister, 1974; Adler, Burns & Johnson, 1976). The comprehensive review of social security tribunals carried out by Professor Bell on behalf of the DHSS upheld many of these criticisms, emphasising the lack of a consistent approach to the exercise of discretion and the wide variation in the quality of SBAT chairmen (Bell, 1975b). Criticism of the tribunal arrangements formed part of a wider concern about the viability of the supplementary benefit scheme and the acceptability of its more discretionary elements (Donnison, 1976; Supplementary Benefits Commission Annual Reports). The reform of supplementary benefit in 1980, gave the

scheme a firm statutory foundation, replaced the wide discretionary powers of the Supplementary Benefits Commission and its officials with detailed regulations approved by Parliament, and led to changes in SBATs which brought them in line with the more legalistic structure and operation of the NILTs. The merging of the two systems in 1984 then became a logical administrative manoeuvre (Bradley, 1985; Mesher, 1983; Harris, 1983).

Other aspects of the relationship between individuals and the social security system have been addressed either directly or indirectly in the course of research. The problem of potentially eligible claimants not claiming benefits has been explored by, inter alia, Kerr (1984) in relation to supplementary pensions, Corden (1981) in relation to family income supplement, and Beltram (1984) in relation to supplementary benefit. Claimants' knowledge of social security and their views on the DHSS, on stigma and fraud, and on the adequacy of benefits were surveyed by Briggs and Rees (1980) and more recently in relation to the single payments provisions of supplementary benefit legislation by Berthoud (1984). The abuse of social security and the backlash of 'scroungerphobia' that it creates have been examined in Moore (1981), Golding & Middleton (1982) and Franey (1983).

The organisation and administration of social security, however, have attracted little interest. Of recent origin are the explanatory articles by Warner (1984a, 1984b) on the reorganisation of the internal structure of the DHSS and the flow of information within it, and O'Higgins' critique (1984) of the 'Operational Strategy', the DHSS's massive programme to computerise the social security system.

Likewise, there have been few studies of the routine interaction between the individual and the DHSS at what might be called, in the military metaphor often favoured by the Civil Service, the 'front line'. Those that do exist have been almost exclusively concerned with supplementary benefit; where reference has been made to the

administration of other benefits this has usually been only for purposes of comparison. There have been no studies of the administration of other social security benefits in their own right. The most relevant of the few studies that have been undertaken in the last twenty years or so are examined in the next section.

### 3 - The paucity of social research at the 'front-line' of social security

Whilst the DHSS does carry out its own research, the results are primarily intended for internal monitoring and evaluation purposes or for assessing policy options, and are generally not published or made available to the public.

Of non-DHSS research into aspects of the administration of social security is perhaps the most noticeable feature its paucity. Adler (1985) suggests that one of the main reasons for this is the dominant position of the DHSS<sup>(\*)</sup>. Social security is the direct responsibility of a central government department; unlike many welfare provisions (such as health, education, housing and social work) there is no external agency to implement policy. As a result, policy-related research is concentrated within the DHSS itself and is rarely published. Furthermore with implementation of social security policy being the direct responsibility of a department under the Secretary of State for Social Services, it becomes a particularly sensitive area of government activity. Criticism cannot be deflected onto, for example, health authorities, or local authority housing, education, social work and social services departments, and hence becomes especially unwelcome. So, since social research is by its nature a critical exercise, this dislike of criticism generates a concomitant dislike of social research. Another result of the central position of the DHSS is that training for social security officials (who are generalist civil servants) is undertaken internally - there is no professional organisation concerned with the education of its members (unlike for

professionals in health, social work or housing administration). The overall result is that a massive, complex government department has remained largely opaque to outside scrutiny.

The few external studies that have been carried out reveal the diversity of potential research opportunities that remain untapped. They also demonstrate the relative importance of the ex-DHSS civil servant in providing insights into front-line activity; of the works discussed in this section, those by Hill (1969), Laurance (1980), and Beltram (1984) are written with the advantage of the insider's practical experience. But whilst insiders' views are particularly illuminating they also serve to underline the lack of penetration into the area by external researchers.

Hill's seminal article (1969) combines description of his experience of working in a National Assistance office in the early 1960s with an analysis of how the social security legislation then current allowed officials to use (and sometimes abuse) the discretion granted them. The picture emerged of a workforce which struggled to operate a complex system under the combined pressures of a heavy workload and public hostility. Their task was made more difficult by gaps in the legislation which often obliged officials to make decisions based on their own interpretation of government policy but which also allowed them to impose their own values in making decisions. Some officials, according to Hill, welcomed this opportunity to distribute social security according to their own views of which claimants were 'deserving' and which 'undeserving'.

The intrusion of personal values in the treatment of supplementary benefit claimants is also identified by, for example, Laurance (1980), Beltram (1984) and Howe (1985), and in the series of studies by the Policy Studies Institute (PSI) into the operation and effects of the Single Payment regulations (Berthoud, 1984). A recurrent fear raised in these studies is that the personal values and prejudices of



individual social security officials will influence their decisions. Hill, Laurance and Howe all provide instances of this occurring, but by their nature (ie each being based on one local office only) these studies cannot speculate with any confidence on the extent of the problem. In contrast, Working Paper 'B' in the PSI series, analyses the responses of 170 DHSS supplementary benefit officers in 50 offices to a questionnaire about their attitudes and concludes that,

"There is not evidence in support of the hypothesis that staff attitudes determine rates of single payments; it can hardly be claimed that the data constitutes evidence to refute that hypothesis either." (Berthoud, 1984, p.B43)

Kay (Scottish Consumer Council, 1985) also notes a prevailing sense of distrust of the claimant by officials that is identified in other studies which, she argues, spills over into the routine contacts between claimants and staff at the social security office counter and, combined with the often poor physical conditions of DHSS offices, generates an atmosphere of hostility and unpleasantness exacerbating the already difficult relationship between them.

For these writers the central problem, through which the personal values and prejudices of officials manifest themselves, is discretion, whether it is intended, ie a power vested in officials to tailor their decisions to meet the needs of the claimant in his or her particular circumstances, or is merely generated by the nature of legislative and administrative rules in which it is impracticable to encompass all the possible personal circumstances of claimants.

A novel (and unique) study by Coleman for the Child Poverty Action Group (Coleman, 1970) examined the internal management of letters of appeal from claimants, the majority of which were disposed of administratively without progressing to an appeal tribunal. The statistical analysis of a full year's appeals was valuable not only for the insights it provided but also for the questions it raised. For example, Coleman found that 36% of appeals resulted in amendment

either by the DHSS or by an appeal tribunal, a statistic that could be interpreted as reflecting a sensitive appeals mechanism or providing a disturbing commentary upon the poor quality of initial decision-making. Over fifteen years later part of Coleman's conclusion remains a pertinent observation:

"...the administrative process itself, and its problems, both require and are worthy of greater attention than they traditionally receive." (p.14)

Unless there is some as yet unforeseen movement towards a more open style of government, the opportunities for conducting research into the administration of the DHSS (and many other government departments and agencies) are likely to remain few. At the time that this research was conducted this unpromising position was exacerbated by the high political profile of social security generated by the series of reviews instigated by the then Secretary of State, Norman Fowler, which rendered external research (and particularly its potential for embarrassing criticism) all the more precarious.<sup>(9)</sup>

#### 4 - Why studying the front line is important

"... great importance must be attached to consistently good decision-making by the authority responsible for decisions of first instance. An appeal system cannot take the place of good quality first-tier decision-making..."

(Bell et al, 1974, p.309)

Having identified a gap in our understanding of the workings of the social security system, the question is then raised of how important it is to attempt to fill it. It is hoped that in retrospect this thesis will have demonstrated its importance, but in prospect I would argue thus: the size and importance of the social security system has already been demonstrated; from their different perspectives both the government and the individual claimant have an interest in the legislation of social security being implemented effectively and efficiently, the government wishing to ensure that only those who are



entitled to receive benefits actually receive them, and then at a cost which it considers acceptable, and the individual claimant concerned that he receives his full entitlements under the law and without unnecessary delay. When considered in this light it is clear that concentrating research on the appeals system contributes little to establishing whether these ends are achieved.<sup>'10'</sup> The vast majority of social security decision-making is undertaken at the level of the initial decision of a claim not at the tribunal level (in 1985, for example, fewer than 0.5% of all social security claims were considered by an appeal tribunal<sup>'11'</sup>). If we want to ensure that the social security system is working as we would wish, then it is to the level of the initial decision that we must look.

Partly because of the legal nature of decisions about social security benefits, analysts of the tribunal system have sought to ensure that some of the safeguards of judicial trials are reflected in the structure and procedures of tribunals. It is therefore surprising to find that this concern has not been extended to the level of the initial decision which is as much based on statutory provisions as the decision of a tribunal. One explanation of this difference could appeal to 'interest theory' (Harlow and Rawlings, 1984, pp.80-82) which maintains that the extent of the safeguards provided for an individual in an administrative process should reflect the impact of the decision that emerges from it. However, it could be argued, that far from being relatively insignificant, benefit decisions have a potentially large impact upon many of the recipients. Campbell (1978) adopts this position, after noting that in some welfare settings, for example those which may involve a loss of liberty, judicial safeguards are built into decision-making procedures,<sup>'12'</sup>

"Similar safeguards do not seem ... to be thought necessary where the decisions to be made by the state concern not the loss of liberty but the loss of benefit or personal assistance, and yet the interests of individuals may be just as significantly affected by the failure of the state to provide a welfare benefit as by the exercise of its powers

of compulsion over the individual."

(Campbell, 1978, p.70)

At this stage one objection must be met, ie that of the irrelevance of a study which is concerned primarily with the procedures of social security and not its substance, a criticism succinctly captured in Zucker's challenge "what happens when the decision process is just but the outcome is not?" (Zucker, 1985). The warning is implicit in the question that satisfaction with sound and fair procedures should not be confused with approval of the outcomes of those procedures. A further criticism arises not from conflating outcome and substance with process but from keeping them separate. It has been argued that the substantive rights of individuals are not always enhanced by increasing their procedural safeguards (Handler, 1966; Prosser 1977), ie what a welfare applicant receives at the culmination of the process will not necessarily be affected by the process itself. Furthermore, as Prosser (1977) has argued, enhanced procedural rights ensuring greater fairness and equity may also grant, by association, the symbolic appearance of fairness and equity to the substantive outcomes themselves thus deflecting critical appraisal of those outcomes. The reason that criticisms arise from opposite viewpoints is that in practice procedure and substance are closely linked; as Galligan (1986a) writes,

"... the object of procedures is to realise a given object, and so in this sense procedures are instrumental to outcomes." (p.138)

So, whilst it may be true that increasing procedural rights does not necessarily improve substantive outcomes, it is equally true that it may do so where they enable a welfare recipient to obtain his full entitlements. Some welfare benefits and services may not be considered generous but if the intended recipient cannot exercise his rights to them then he is doubly disadvantaged. If greater procedural

rights can ensure that he receives his entitlement, then his welfare is increased even if his substantive entitlements are not.

It is the distinction between substantive outcomes and procedural rights that provides both a defence of a study that deliberately restricts itself to procedural issues and an indication of its limitations as a tool with which to analyse the content or substance of welfare policies (see Adler & Asquith, 1981, pp.16-18). If procedural rights increase a recipient's welfare then that should be justification enough for seeking their improvement, but the message to be drawn from the criticisms of Handler and Prosser is that such an aim should not be allowed to overshadow the necessary parallel task of subjecting to scrutiny the substantive content of welfare benefits and services. And in practice the two may complement each other if increased awareness and involvement by individuals and their representatives in the process of welfare delivery also increases their awareness and knowledge of what the substantive provisions are. If the process is above reproach but the outcome is still perceived as unfair in some way then some useful purpose will have been served.

The conclusion must be that procedural and substantive issues are not, and should not be imputed to be, in competition with each other. Furthermore, process and substance can be separated analytically and be studied individually without implying that they do not interact.

## **5 - The need for theory**

In identifying as an important area of research the administration of social security at the 'front line' we are faced with a further set of questions which resolve themselves into two distinct groups. Firstly, we are concerned specifically with the detail of how decisions are made in practice. Explanation, therefore, relies on the tools of descriptive analysis. Secondly, and perhaps more importantly we need

to know how to evaluate what we find, to be able to judge whether what happens is what we want to happen, ie what ought to happen. Description alone cannot provide the answers, what is required is a normative theory of the relationship between the individual citizen and administrative agencies of the state. It is an approach that Prosser (1982) endorses in his argument for a new, critical stance towards the theory of public law:

"(theory)...should not only describe and explain the operation of state institutions but should also provide the means for an effective critique of them and point the way for their future development." (p.2)

A normative theory of the relations between the administrative agencies of the state and the individual is little developed in the British literature. The most comprehensive effort has come instead from the USA in Mashaw's 'Bureaucratic Justice' (1983) in which he takes the notion of administrative justice which had previously been used fairly loosely, to encompass the means by which individuals could seek redress against state agencies against whom they held a grievance, and develops it to embrace the more important (ie in the pursuit of mass justice) element of the initial encounter between agency and individual.

In chapter 2 Mashaw's innovative thesis is taken as the starting point for a theoretical investigation of administrative justice and the nature of decision-making which informs the empirical investigation into the administration of industrial disablement benefit and mobility allowance later.

6 - Necessary diffidence: avoiding the lure of over-ambitious generalisations

For mainly pragmatic reasons (discussed in chapter 3), the empirical element of this study is concerned with the examination of only one part of the social security system, ie a description and evaluation of the administration of industrial disablement benefit and mobility allowance. The validity of such an approach has been argued, but conversely we must also be clear about its limitations. Firstly, administrative justice, as its adjectival-nominative construction indicates is a qualified notion of justice, ie one form of a wider concept of justice, a particular manifestation of justice in the context of a defined set of social relations (ie between state and individual). Administrative justice can therefore be considered, as other notions such as 'social' or 'distributive' justice can also be considered, a kind of 'sub-set' of the formal and abstract concept of justice. As such administrative justice both draws on the wider concept for its formulation and can also contribute to its development.

Secondly, it must be admitted that any normative theory will be based on necessarily subjective foundations, not fixed, provable propositions. There is, therefore, no fundamental theory of justice that awaits discovery and hence no definitive conception of administrative justice, each must be based ultimately on moral beliefs or principles which cannot be, as MacCormick (1977) points out, "the result of a chain of logical reasoning."

If we are to accept the development of an argument that is based on a normative theory, then that normative theory and its ultimate principles must be laid bare and found to be convincing. Kamenka (1978) sets out how a normative set of ideas must be judged,

"It is to be judged by its internal coherence and logical consistency, by the truth of its associated empirical claims and its relation to relevant empirical material that it may

or may not take up and, in the last resort, by its relation and that of its consequences and implications to our own beliefs." (p.12)

Chapter 2 will adopt this approach in the examination of Mashaw's analysis of administrative justice. And, of course, it is a test which the subsequent development of Mashaw must also satisfy.

A third limitation stems from a development of theory which draws upon a concomitant empirical study (a technique drawing on the notion of 'grounded theory' expounded by Glaser and Strauss (1967)). The problem of this approach is one of extrapolating the analysis beyond the boundaries of the empirical material. A concept of administrative justice, however, concerned as it is with the relationship between state administrative agencies and individuals, should be relevant for all such relationships regardless of the type of agency involved or the type of policy it implements. In this study a distinct part (ie industrial disablement benefit and mobility allowance) of a specialised social programme (ie the provision of social security), operated by a specific kind of state agency (ie one dispensing welfare benefits) forms the empirical focus for enquiry. The temptation to claim any wider relevance (even to the rest of the social security programme) should therefore be treated with caution. This is not to suggest that a formulation of the concept of administrative justice grounded in an examination of the administration of industrial disablement benefit and mobility allowance will have no relevance for the administration of other social security benefits (on the contrary, it certainly should have) or the administration of other social services, but to warn against too great a claim being made for its general applicability. One could make an analogy here with statistical tests of significance and say that whilst we may have a confidence level of 99% for the relevance of the theoretical analysis to industrial disablement benefit and mobility allowance, this level drops to say 95% for the rest of social security, and drops lower for other social services, and so on. It is only by further empirical



study that the analysis of administrative justice offered here can be strengthened, changed or discarded; this study can only claim to be a beginning.

## **7 - The structure of the thesis**

The subsequent six chapters of this thesis fall into three groups. Chapters 2 - 4 provide the necessary prelude to an empirical analysis of social security administration with a theoretical development of administrative justice (chapter 2), a discussion of the methodology adopted for the empirical investigation (chapter 3) and a discussion of the organisation of the DHSS and its internal distribution of decision-making responsibilities (chapter 4). Chapters 5 and 6 present the empirical analysis of the administration of industrial injuries benefit and mobility allowance respectively. Finally, chapter 7 presents the conclusions of the study.

Based on Mashaw's seminal analysis (1983), chapter 2 develops the concept of administrative justice into a normative framework within which to conduct empirical research. Firstly, Mashaw's theoretical ideas are summarised and a critique of them offered. Following this an analysis of a generalised process of decision-making is presented separating out the two distinct phases of the operation, the collection of information or evidence on which to base a decision, and the subsequent application of the relevant 'decision criteria' (whether they are constituted in statute or case-law, internal administrative rules, or derived from some other source, such as a body of professional knowledge or the personal value system of an individual decision-maker). Based on the critique of Mashaw and the analysis of decision-making, the concept of administrative justice is then reformulated as a normative, evaluative tool with which to examine decision-making by welfare-providing agencies.

Chapter 3 describes the formal system of 'adjudication' used within the social security system as a means of producing (supposedly) independent decisions. The different arrangements for lay and medical adjudication are then described. A brief section describes the present organisation of the DHSS, and the place of two bodies external to the adjudication system, the Office of the Chief Adjudication Officer and the Office of the President of Social Security Appeal Tribunals, is discussed. This is followed by an analysis of the meaning of adjudication as a distinct form of decision-making, which draws the important conclusion that it forms only part of the total process which produces a decision on a social security claim, thus requiring that a study of social security decision-making in practice must look beyond the 'official' adjudication arrangements. Finally, the chapter relates the general demands of administrative justice (identified in chapter 2 in relation to welfare-providing agencies) more specifically to the social security system.

Chapter 4 explains the methodology adopted for the empirical part of the study. The use of 'multiple strategies' in social research is discussed and the case is put for the adoption of such an approach involving a mixture of semi-structured interviews with DHSS officials, an examination of internal and publicly available documents, and scrutiny of a sample of casepapers. A breakdown of the interview sample is given, followed by a note on how the data collected from such diverse sources was analysed. An appendix to the thesis reproduces the interview schedules which were used.

Chapter 5 links the earlier theoretical analysis to an examination of the administration of decision-making on initial claims for industrial disablement benefit. Part I introduces the legislation of industrial injuries and the distribution of decision-making responsibilities within the DHSS. In part II the formal arrangements for making decisions on lay and medical questions arising from a claim are compared with decision-making in practice, drawing on the extensive



interview material gathered from a sample of those officials who have a significant bearing on the process. In part III an assessment is made of the extent to which the demands of administrative justice are either promoted or retarded in the routine assessment of claims for industrial disablement benefit.

Chapter 6 on mobility allowance follows a similar pattern to chapter 5. The legislation and allocation of decision-making responsibilities are described followed by an analysis of the lay and medical inputs to the decision-making process. Finally, mobility allowance decision-making is evaluated against the demands of administrative justice.

Chapter 7 presents a discussion of the conclusions that can be drawn from the theoretical and empirical analyses. One important measure of the effectiveness of a normative theory, as Prosser has argued (see p.13), is its ability to point the way for future development. The chapter, therefore, discusses what that direction for future development might be, and suggests some of the possibilities that could increase the chances of achieving administrative justice in the administration of the social security system in general, and of industrial disablement benefit and mobility allowance in particular. The thesis concludes with an assessment of the contribution made to the development of the concept of administrative justice, and its place in a critical, normative theory of the relationship between state agencies and individuals.

As mentioned earlier, social security is subject to constant review and change in both its substantive legislative content and in its working practices (whether rooted, for example, in developments in technology or the pursuit of greater efficiency in administration). The evaluation presented here, therefore, can only be a 'snapshot', a picture of the administrative arrangements pertaining at the time the fieldwork was undertaken between February and September 1986. The

relevant legislation in force then was primarily the major consolidating Act of the 1970s, the Social Security Act 1975 and its train of Statutory Instruments, plus the various statutory amendments up to but not including the Social Security Act 1986 which introduced changes to the law of both industrial injuries and mobility allowance.

## CHAPTER 2 - ADMINISTRATIVE JUSTICE AND WELFARE DECISION-MAKING

"... it is unfair for officials to act except on the basis of a general public theory that will constrain them to consistency, provide a public standard for testing or debating or predicting what they do, and not allow appeals to unique intuitions that might mask prejudice or self-interest in particular cases."

(Dworkin, 1977, pp.162-3)

### **Part I - INTRODUCTION**

Administrative agencies of the welfare state fall into two broad categories: one group will be concerned to regulate the activities of individuals and public and private organisations in specifically demarcated areas (for example, the Health and Safety Executive, HM Customs and Excise, Local Authority Trading Standards Departments), whereas the second group provide some kind of service to the public (for example, the NHS, local authority Social Work and Social Services Departments, the DHSS)<sup>(1)</sup>. Whilst a general theory of administrative justice should apply to both categories, this chapter will be concerned primarily with the second group in order to develop a theoretical framework for the empirical analysis of the administration of the DHSS as a welfare-providing agency.<sup>(2)</sup>

Welfare administrative systems are primarily mechanisms for distributing society's scarce welfare resources. Within the context of the post-war welfare state this task is undertaken mainly by agencies of the state, whose responsibilities, duties and powers are defined in Acts of Parliament and elaborated in Statutory Instruments. It is within this legal framework that the concept of administrative justice has meaning, being concerned with the relations between state agencies and individuals who are affected by welfare legislation. This concern with administrative justice is prompted by the general

desire for individuals to be treated fairly and equitably by a state apparatus which has expanded consistently over the last two centuries to impinge upon virtually every aspect of social life.

Until recently, as explained in chapter 1, the main thrust of studies of administrative justice has been the capacity of individual citizens to hold state officials to account for their decisions. Hence discussion has centred on the methods adopted to ensure that individuals are able to have their complaints heard by an independent body and, where appropriate, obtain redress. The concern with administrative tribunals has a long pedigree, including the important early contribution of Robson, and the major reports from Donoughmore and Franks<sup>(3)</sup>. A more recent concern has been with the actions, not of tribunals, but of the officials whose decisions give rise initially to the need for grievance and redress procedures. In a social security context this interest has been manifested in this country most noticeably in the debate on discretion which was at its most lively and potent in the 1970s in relation to supplementary benefits, but which has relevance for a variety of welfare settings.<sup>(4)</sup>

The two debates, over appellate procedures and the operation of discretion in welfare delivery, are closely linked at a practical level but have lacked a common conceptual and theoretical framework. An important contribution towards filling this gap is Mashaw's<sup>(5)</sup> Bureaucratic Justice (Mashaw, 1983) in which he examines the concept of administrative justice and questions its meaning for an administrative agency responsible for implementing a welfare programme. His task as he saw it was to re-orient debate away from a preoccupation with appeals mechanisms (which he called 'external' administrative law) towards the administrative agencies themselves, and to ask questions about the operation of an 'internal' administrative law which guides their routine activities. If such an internal administrative law could be identified then it could be utilised as a set of normative standards to promote the fair and equitable treatment

of individuals in their dealings with state welfare agencies. Mashaw's work was seminal in theorising about administrative justice but is not, and was not intended to be, definitive. Rather, it invited further development. For a study of the social security system in this country, such development must, as Ogus (1987) points out in his review of 'Bureaucratic Justice', "fit the British context" (p. 315).<sup>6</sup>

The purpose of this chapter is to scrutinise Mashaw's theory-building, to identify its strengths and weaknesses and to develop the insights it contributes to an analysis of administrative justice which can provide a normative framework for the examination and evaluation of front-line decision-making.

## Part II - MASHAW AND ADMINISTRATIVE JUSTICE

### 1 - The Mashaw Thesis

Mashaw's inquiry, conducted in the United States, developed from an examination of a large body of literature critical of the Social Security Administration's (SSA) implementation of the Disability Insurance Program (DIP), which makes benefit payments to disabled claimants who satisfy a series of occupational, medical and vocational conditions, and promotes rehabilitation schemes to enable these claimants to re-enter the labour market. From this literature he identified three main strands of criticism which viewed the DIP's adjudicatory function in divergent ways.

One strand criticises the SSA for failing to manage the assessment of claims in ways which ensure predictable and consistent outcomes. A second strand takes the view that the DIP has a paternalistic and therapeutic purpose which demands service for claimants from various professional disciplines. Hence, the bureaucratic decision-making process of the SSA is criticised for failing to provide a role for professional judgement or to adapt to a service orientation. The third perspective is more 'legalistic' and is concerned primarily with the capacity of claimants to assert and defend their rights to disability benefits. Hence the emphasis is on hearings and appeals mechanisms<sup>77</sup> and their inability or failure to provide the essential elements of judicial trials.

Having identified these lines of criticism Mashaw poses the question of why such a pattern should exist and whether there are any characteristics which unify each perspective. His answer has three main elements:

"First, these criticisms reflect distinct conceptual models of administrative justice. Second, each of the models is coherent and attractive. But third, the models, whilst not

mutually exclusive, are highly competitive; the internal logic of any one of them tends to drive the characteristics of the others from the field as it works itself out in concrete situations." (Mashaw, 1983, p.23)

Mashaw then introduces a definition of administrative justice which is not only pleasingly succinct but also important, since it forms the basis of his whole analysis. For Mashaw, the 'justice' of an administrative system means,

"... those qualities of a decision process that provide arguments for the acceptability of its decisions." (Mashaw, 1983, pp.24-25)

ie the decisions which emerge from a decision-making system will be considered acceptable by the recipients or those responsible for the system if they display certain characteristics, these providing what Mashaw calls the 'justice argument' for that system. Three types of justice argument are suggested, each deriving from one of the three strands of criticism identified in the scrutiny of the critical literature. These justice arguments, which form the basis of different conceptualisations of administrative justice are:

"(i) that decisions should be accurate and efficient realisations of the legislative will; (ii) that decisions should provide appropriate support or therapy from the perspective of relevant professional cultures; and (iii) that decisions should be fairly arrived at when assessed in the light of traditional processes for determining individual entitlements." (Mashaw, 1983, p.25)

From this intuitive basis grounded in his own empirical analysis of the SSA, Mashaw posits three models or 'ideal types'<sup>(a)</sup> of administrative justice which he calls Bureaucratic Rationality, Professional Treatment, and Moral Judgement.

**(a) Bureaucratic Rationality**

Under the US Social Security Act the task of Disability Insurance is to pay disability benefits to eligible claimants. Hence the administrative goal should be a system for deciding true and false claims at least possible cost, ie decision-making should be accurate and cost-effective. The emphasis is factual and technocratic; individual decision-makers must deal with the facts that determine the eligibility of a claim and managers must develop the cheapest appropriate mechanisms for this to be achieved. Questions of values or preference should be the responsibility of policy-makers to decide and hence should play no part in initial decision-making by low-level officials.

The type of organisation needed for the task of information collection and assessment on a large scale would exhibit the familiar characteristics of the bureaucratic enterprise, for example, selection and training of personnel, a hierarchical system of delegation, accountability and control based on clearly-defined codes of instruction etc. So, from this perspective,

"... administrative justice is accurate decision-making carried on through processes appropriately rationalised to take account of costs." (Mashaw, 1983, p.26)

Bureaucratic Rationality claims legitimacy from its concern with implementing a socially desirable programme whilst using as few of society's resources as necessary.

**(b) Professional Treatment**

The administrative system of the Disability Insurance Program seen from a Professional Treatment perspective should reflect that, as Mashaw suggests, "the goal of the professional is to serve the client" (1983, p.26), ie it should be explicitly client-oriented;



"it would seek to provide those services ... that the client needed to improve his well-being and perhaps regain his self-sufficiency." (Mashaw, 1983, p.27)

Whilst information is still collected in such a model, and standardised procedures used,

"the incompleteness of facts, the singularity of individual contexts and the ultimately intuitive nature of judgement are recognised, if not exalted." (Mashaw, 1983, p.27)

Using the basic techniques of personal examination and counselling, concern for the individual's overall circumstances would override strict adherence to any rules for deciding eligibility, an approach Mashaw calls 'holistic'.

An administrative system designed to provide professional treatment would be concerned with assigning the appropriate staff to deal with individual needs and requirements. The norms of professional culture would dominate rules, hierarchical controls and efficiency considerations. The model finds its legitimacy in its principal aim of helping the client, and in the personal relationship between client and professional.

"Justice lies in having the appropriate professional judgement applied to one's particular situation in the context of a service relationship." (Mashaw, 1983, p.29; original emphasis)

### (c) Moral Judgement

"The traditional goal of the adjudicatory process is to resolve disputes about rights, about the allocation of benefits and burdens." (Mashaw, 1983, p.29)

This is the essence of the Moral Judgement model which Mashaw suggests finds its most familiar manifestations in civil and criminal trials.

But the adjudicatory process does not just seek to ascertain facts and apply law (which Bureaucratic Rationality does as well) it has to make judgements about worth and preference, in short, about values. Hence, decision-making from this perspective is "value-defining" (Mashaw, 1983, p.29), ie when interests and values conflict the question to be decided is not only what the 'truth' of a situation is, but whose interests and values are to be preferred. So, the central issue in adjudicating cases is,

"... the deservingness of some or all of the parties in the context of certain events, transactions or relationships that give rise to a claim." (Mashaw, 1983, p.30)

This demands a neutral decision-maker, ie someone,

"... not previously connected with the relevant parties or events in ways that would impair the exercise of independent judgement on the evidence and arguments presented." (Mashaw, 1983, p.30)

Mashaw's discussion focuses on traditional examples of dispute resolution to illustrate the Moral Judgement model but asserts that an adversarial setting is not necessarily an integral part, other non-adversary (or inquisitorial) hearings may also conform to the model. The important point, he concludes, is that,

"... the 'justice' of this model inheres in its promise of a full and equal opportunity to obtain one's entitlements. Its authority rests on neutral development and application of common moral principles within the contexts giving rise to entitlement claims." (Mashaw, 1983, p.31)

#### (d) The models compared

Mashaw provides a useful summary in tabular form of the defining characteristics (or 'dimensions') of his models (Mashaw, 1983, p.31).

FIGURE 2.1 - Mashaw's models of administrative justice

DIMENSION  MODEL	LEGITIMATING VALUES	PRIMARY GOAL	STRUCTURE or ORGANISATION	COGNITIVE TECHNIQUE
BUREAUCRATIC RATIONALITY	Accuracy and Efficiency	Program Imp- lementation	Hierarchical	Information Processing
PROFESSIONAL TREATMENT	Service	Client Satisfaction	Inter- personal	Clinical Application of Knowledge
MORAL JUDGEMENT	Fairness	Conflict Resolution	Independent	Contextual Interpret- ation

This table will be referred to frequently throughout the remainder of this chapter; it is mostly self-explanatory, although the 'dimension' of 'Structure or Organisation' perhaps needs clarification. At first sight the inclusion under this heading of 'hierarchical', 'interpersonal' and 'independent' appears puzzling since they do not seem to be comparable characteristics. 'Hierarchical' seems to describe an organisational structure of the line management type comprising a hierarchy of superior and subordinate staff. 'Interpersonal', on the other hand, seems to refer to an aspect of the relationship between the provider and the prospective recipient of a service and says nothing about the organisational structure, just as 'hierarchical' says nothing about provider-client relationships. And 'independent', in Mashaw's discussion of Moral Judgement, appears to refer to the special circumstance where the decision-maker is independent of two

parties involved in a dispute (even though Mashaw notes that such an occasion need not necessarily be adversarial).

The categorisation used by Mashaw makes more sense, however, if we consider the terms in some way descriptive of the place of decision-makers in relation to the relevant administrative agency. Bureaucratic decision-makers are part of a hierarchical organisation such that they are responsible for their decisions to a superior within that organisation (who presumably can legitimately direct or alter the decisions of the initial decision-makers). In contrast the adjudication of the Moral Judgement model is autonomous and independent. Adjudicators are solely responsible for their decisions, and although there may be some external means by which those decisions may be changed, they cannot be directed in what decision to make. Professional decision-makers are also autonomous like independent adjudicators, but need not remain similarly 'independent'; they may involve the service recipient in making decisions and, where appropriate draw other colleagues into the process.

Having developed his models, Mashaw uses them as analytical tools to explain the development and evaluate the performance of the SSA in its implementation of the Disability Insurance Program. An important aspect of Mashaw's thesis is that the models are 'competitive'. He does not mean by this that they are mutually exclusive in the sense that the existence of one denies or prevents the existence of the others in an administrative system. The effect of this competition is, he argues, more that if a conscious effort is made to promote one model then the others will be diminished in importance but not necessarily in direct proportion, ie an increase in Bureaucratic Rationality of 'X' would not necessarily lead to a corresponding loss of 'X' in Professional Treatment or Moral Judgement. Indeed one of his conclusions, that an injection of Bureaucratic Rationality would increase the overall justice of the Disability Insurance Program, rests partly upon this assertion. This notion of 'competition'

between the models as well as the underlying justification for each will be explored in a critique of Mashaw later in the chapter. However, since this critique is based mainly upon Mashaw's own definition of administrative justice I wish initially to examine this definition in some detail.

## 2 - Defining administrative justice

### (a) Probing Mashaw's definition of administrative justice

It was noted earlier that Mashaw's definition of administrative justice as:

"... those qualities of a decision process that provide arguments for the acceptability of its decisions." (Mashaw, 1983, pp.24-25)

is very persuasive. The apparent simplicity of this definition, however, conceals a depth of complexity which can be explored by considering a number of questions raised by the wording of the definition itself. The first of these concerns Mashaw's emphasis on the process of decision-making rather than the substance. This emphasis was discussed in chapter 1 (see pp.11-12) and found to be convincing. The second question concerns the 'acceptability' of decisions. If acceptability is a yardstick of administrative justice then the question of 'acceptable to whom?' is raised - the service recipients? the decision-makers? the wider society? Having tackled these questions we have the basis for a critique of Mashaw which will allow us to address the question which is the crux of a definition of administrative justice: can we identify the 'qualities' that a welfare agency should embody in order for its decisions to be considered acceptable?

(b) For whom must the decision process be 'acceptable'?

Clearly there is more than one possible response to this question. If the answer is 'the individual citizen' then the qualities required of the decision process will be different from those had the answer been the management of the administrative agency, or the front-line official, or the government of the day, or the public or the media.

For individuals, having their needs or entitlements fully met will be their main demand from a welfare system, but for the relevant administrative agency or the government this will represent only part of their concerns. An example which is relevant for the scrutiny of Mashaw models of administrative justice later is the pursuit of efficiency by administrative agencies. Efficiency is not of direct relevance to individual citizens in securing their entitlements or meeting their needs, but for a government pursuing a particular public expenditure policy it is of central importance since money devoted to one service or part of the economy cannot be used elsewhere (in economists' terms there is an 'opportunity cost' to welfare administration). Hence, the task of achieving social justice (in the sense of a fair and equitable distribution of benefits and burdens between citizens) requires a government to impose expenditure limitations on all administrative agencies (not only those providing welfare services). If unlimited resources were devoted, say, to the accurate determination of social security claims then, given the finite resources available to the government, injustices could result, for example, for the homeless family who cannot be housed or for the patient who cannot be supplied with a replacement hip.<sup>39</sup> Trade-offs are inevitable, but must appeal for resolution not to considerations of administrative justice but to the principles of other conceptions of justice, such as social or distributive justice.

The position adopted in this thesis is that the issues raised by the concept of administrative justice will be addressed from the

perspective of the individual citizen; this follows the approach of, inter alia, Davis (1971) and Mashaw (1974, 1983). However, this approach can be criticised for ignoring the processes of policy-making which provide the substantive rules which delimit the decision-making behaviour of front-line officials.<sup>'10'</sup> The answer to this line of criticism is to recall the process versus substance debate earlier<sup>'11'</sup> and argue that administrative justice, analysed from the perspective of the individual citizen does not preclude or attempt to reduce the importance of decisions about the substantive content of welfare policies. Rather it focuses on an area of public administration which perhaps does not receive as much attention as policy analyses but which, for the individual, may be far more relevant in securing or improving his or her substantive welfare (at least in the short-term).

However, this is not to lose sight of the wider demands of government which will be translated into specific aims and objectives for the administrative agency (such as efficiency, a positive public image, or the detection of fraud). The rationale for these demands is not always easy to pinpoint; they may reflect, for example, a government's desire to secure the equitable treatment of citizens, or a wish to pursue other (explicit or otherwise) social, economic or political ends (such as social control, lower public expenditure, or the enhancement of its electoral appeal). Such demands and pressures are an undeniable influence on administrative agencies and will ultimately filter through the organisation to have some effect on the treatment of the individual. Hence they are important for a study of administrative justice from the perspective of the individual citizen requiring that such external demands (which Mashaw calls 'exogenous' goals (1983, p.60-61) and their effects should form part of the empirical analysis. However, how the anticipated competition between administrative justice and other external demands should be resolved lies beyond the analytical framework adopted for this study.



### 3 - A Critique of Mashaw

Partly because the analysis and evaluation of the Disability Insurance Program, which form the major part of 'Bureaucratic Justice', rests upon Mashaw's development of alternative models of administrative justice, and partly because the work has been heralded as a seminal study in administrative justice<sup>'12'</sup>, it is essential that Mashaw's theorising is carefully and critically examined. The purpose of this critique, whilst acknowledging the contribution of Mashaw in alerting administrative lawyers and social scientists to the need to turn their attention to the 'internal' law of administration, is to indicate that there are a number of questions prompted by his thesis which will repay close scrutiny.

When Mashaw elaborates his three models of administrative justice he is effectively saying that there are three different types of justice that administrative agencies are capable of providing. These exhibit features sufficiently distinct from each other to render them competitive. As coherent descriptive models Bureaucratic Rationality, Professional Treatment and Moral Judgement are plausible and convincing, but the claim is also made for them that they are also normative models. This claim, however, I see as only partly satisfied. Mashaw's model building follows the pattern of, firstly, identifying familiar ways in which decision-making is organised (subsumed in the 'dimensions' of organisation or structure and cognitive technique). Taking Bureaucratic Rationality as an example, he identifies the bureaucratic mode of operations with its hierarchical organisational structure and emphasis on the mass processing of information as a means of decision-making. The second step is to seek the justification for a particular set of decision-making arrangements, which he calls the justice argument. Continuing with the example of Bureaucratic Rationality, Mashaw suggests that the justice argument for bureaucracies is that they hold the promise (if not the absolute guarantee) of accurate and efficient decision-making.



Having reached this point the argument is made that bureaucracies ought to provide accuracy and efficiency and that we can judge their performance against these criteria. This, therefore, is the normative element of Bureaucratic Rationality. However, this line of development fails to identify whether this is all that Bureaucratic Rationality ought to provide, ie perhaps there are other features which bureaucracies ought to exhibit before the claim can be made that they provide administrative justice.

One way of addressing this problem is to rephrase Mashaw's definition of administrative justice as an explicitly normative question thus: what are all the qualities that a decision process ought to display in order for its decisions to be considered acceptable? Whilst Mashaw does not confront this question directly, an examination of the proffered justice argument for each of his models does help identify an answer.

#### **(a) Examining the 'justice arguments'**

In Mashaw's tabular representation of his models, he posits the two distinct 'dimensions' of legitimating values and primary goals. However, it is not always clear from Mashaw's own discussion how these are to be distinguished from each other. For example, Mashaw states (1983, p.26 and p.31) that the legitimating force behind the Bureaucratic Rationality model is its promise of the accurate and efficient implementation of a social programme, whilst later he describes its 'principal goals' as 'rationality and efficiency' (1983, p.214). And similarly 'service' features as both a legitimating value (1983, p.31) and a primary goal of Professional Treatment (1983, p.26). It appears that to separate out distinct legitimating values and primary goals is both confusing and unnecessary. One way of overcoming the confusion is to simplify Mashaw's models by conflating these two dimensions to reveal the main justice arguments underpinning each model. The main justice arguments of Bureaucratic Rationality (see above, p.26) are

now seen to comprise accuracy and efficiency, ie we accept the decisions of an administrative agency based on this model because they are produced accurately and efficiently. For Professional Treatment the justice argument is service, ie we accept decisions because they are intended to improve our personal circumstances, and increase our well-being. The decisions of a system based on Moral Judgement are acceptable because they emerge from a process in which the traditional elements of a 'fair trial' are present.

The question that now arises is whether these justice arguments are sufficient to convince us that administrative agencies based on each do provide administrative justice; the models tell us what each has to offer but not if this all that they ought to offer. To answer this an exploration of these reformulated justice arguments is necessary.

### Efficiency

Mashaw argues that one of the promises of bureaucracy is 'efficiency'. However, there appears to be a case against its inclusion in the justice arguments for Bureaucratic Rationality. One objection is that Mashaw fails to supply an explanation of how the strand of criticism of the DIP which he summarises as the failure to produce 'predictable and consistent outcomes' (1983, p.22) leads to the inclusion of efficiency as a defining characteristic of the model. No logical line of argument connects the two.

Whilst accepting that a bureaucratic organisation will almost invariably pursue efficiency in its activities, the same would also be true of any organisation (for example, one providing a professional service); it is difficult to see how the efficiency of an organisation (which itself is open to differing interpretations, although the implication in Mashaw is that it means decision-making at the least possible cost) provides any argument for the acceptability of its decisions. A service-providing agency producing predictable and

consistent decisions need not also produce them at any particular cost in order to claim that its decisions are just; it is rare that anyone complains that a trial involving expensive counsel produces unjust decisions merely on the basis of the high costs incurred (although, of course, the process may be considered to be unfair if the cost of achieving a just decision bears disproportionately on one of the parties involved). Efficiency may be a desirable objective but it is not a 'justice argument'; indeed an agency trying to act efficiently may, as Mashaw himself points out, have to make trade-offs between costs and correctness. It is difficult to see how consumers given incorrect decisions denying them the services or benefits to which they are entitled or which they need, will be convinced of the justice of the system. And the argument that a number (presumably small) of incorrect decisions is the price that must be paid for a low-cost administration is unlikely to persuade them otherwise.

The conclusion must be that when considered from the individual citizen's perspective, 'efficiency' can have no place in any justice argument for a particular method of administering a welfare service. However, to dismiss cost considerations from an analysis of administrative justice may appear to divorce the discussion from the real world. My answer would be that questions of costs, resources and efficiency are not irrelevant to a discussion of administrative justice, rather that they should be addressed as organisational constraints within which a welfare system must operate, and as potential barriers to the achievement of administrative justice for the individual. They should not find a place amongst the defining characteristics of any one model of administrative justice.

#### Accuracy

The argument that we should accept the decisions of a bureaucratic organisation because they are accurate is an overwhelming one (whether or not they are in practice is, of course, an empirical question).

However, the decision-makers relevant to Mashaw's other two models, professionals and independent adjudicators, are surely just as much expected to produce 'accurate' decisions as the officials of a bureaucratic organisation. Indeed, in what Mashaw (1983, p.26) calls the 'queen of professions', medicine, making a 'wrong' decision could have the most catastrophic consequences for an individual, such that 'accuracy' might be considered a more appropriate goal than 'service'. It is important here to be sure of what we mean by 'accuracy' in a professional context since it might be presumed to differ in nature from accuracy in a bureaucratic context. A possible definition of an accurate professional decision is one which provides a complete and correct assessment of an individual's circumstances, and the choice of an appropriate response to them.

In the case of independent adjudicators, there is surely a similar expectation that 'accurate' decisions will emerge from the decision-making process. Indeed, where the model is adopted for appeal hearings (one of Mashaw's examples, and applicable to the system of administrative tribunals in Britain) there is the assumption that previous 'wrong' decisions will be rectified. (13)

When Mashaw assigns accuracy to only the Bureaucratic Rationality model of administrative justice, there is the implication that it is not a defining characteristic of either Professional Treatment or Moral Judgement. The discussion above argues that, on the contrary, 'accuracy' should also be the promise of the professional or the independent adjudicator.

### Service

The notion of 'service', particularly in Mashaw's discussion of Professional Treatment (pp 26-29), is not explored in any depth, but rather there is the implied uncritical assumption that because 'service' is, per se, a 'good thing' then any decision process that

can lay a claim to this virtuous attribute has a concomitant argument for the acceptability of its decisions. I do not wish to imply here that service is, a bad thing, but rather to question whether it is sufficient as the basis for a claim to administrative justice. To turn the question around we can ask what it is that the individual should want from a professional decision process? Given the arcane nature of a great deal (though not all) of a body of professional knowledge, the answer might be that what is fundamentally desired is an appropriate response to our individual circumstances. What Mashaw is suggesting is that because of the service relationship between decision-makers and clients, this is virtually axiomatic.

Yet this assumption has potentially undesirable side effects (from an administrative justice perspective); the acceptance of the decisions of professionals without challenge, merely because they are putatively in clients' interests offers professionals the opportunity to avoid having to demonstrate that their decisions were indeed an appropriate response, and the opportunity of hiding behind the "mystery and charisma" of their office (Mashaw, 1983, p.38).

An attempt to rid the Professional Treatment model of its somewhat value-laden legitimating value might be to suggest an alternative justice argument; viz. that the decisions of a professional decision-process are acceptable because they demonstrate an accurate assessment of an individual's circumstances and an appropriate response to them in the light of the current state of professional knowledge. Which is, of course, our definition of accuracy in a professional context noted above.

### Fairness

In contrast to the Moral Judgement model, which claims 'fairness' as a legitimating value, there is no explicit promise of fairness in the Bureaucratic Rationality and Professional Treatment models, nor any

discussion of what 'fairness' might mean in a bureaucratic or professional context. The argument below, which forms the crux of this exploration of Mashaw's models of administrative justice, is that 'fairness' should also form part of the normative demands of administrative systems based on bureaucratic or professional principles.

Whilst, according to Mashaw, the Moral Judgement model promises fairness, I have argued above that it should also promise accurate decision-making. And by implication it does, since the essential elements of a 'fair trial' are designed to produce the right outcome in what might be a complex set of circumstances. The justice argument, of Moral Judgement, therefore, might be extended to include accuracy, ie by invoking traditional practices of adjudication, acceptable decisions result because the fairness of those practices ensure a high level of accuracy.

#### **(b) Distilling the essence of administrative justice**

So far, I have reinterpreted Mashaw's models to elaborate what I see as the valid justice arguments behind each. If we now return to the question posed earlier of what qualities an administrative system ought to display, a clear proposition emerges, which can be summarised in the normative statement: the qualities that a decision process ought to exhibit, which provide arguments for the acceptability of its decisions, are the ability to provide accurate decisions and the ability to produce them in a manner which is fair.

#### **(c) The contribution of 'organisation' and 'cognitive technique'**

Having examined, and reformulated, Mashaw's dimensions of legitimating values and primary goals, I wish to return briefly to the remaining two dimensions, 'organisation or structure' and 'cognitive technique', which I see, not as direct justice arguments (for example, decisions are not acceptable purely because they emerge from a hierarchical



organisation or because the decision-maker is independent) but as contributors to the relevant main justice arguments. Imposing this interpretation on Mashaw's models, therefore, suggests that a hierarchical organisation utilising information processing as its main cognitive technique promotes accurate decisions by its ability to maintain control over decision-making through supervising and checking decisions from which the need to make intuitive judgements has been excluded. So, we accept bureaucracies, not per se, but because as one form of organisational structure, they promise accurate decisions. Similarly, interpersonal working relationships and the use of professional knowledge promote accurate professional decision-making. And in the Moral Judgement model the independent status of the decision-maker using traditional adjudicatory techniques promises accuracy and fairness.

Although Mashaw's Moral Judgement model, as I have interpreted it, does hold the promise of accuracy and fairness, I am not suggesting that its elements (or 'dimensions') should be preferred above other forms of organisation or cognitive technique. One argument of this chapter is that administrative justice is not prescriptive in this way but that many forms of organisational arrangements may be capable of satisfying its demands.

From the argument that each model should be able to meet the normative demands of both accuracy and fairness to satisfy fully the achievement of administrative justice, a number of theoretical and empirical challenges emerges: how does a service-providing agency organised on bureaucratic, professional or independent adjudicatory principles respond in theory to the demands of accuracy and fairness; and how, empirically, can we evaluate whether these demands are being met in practice?

(d) Résumé

This analysis of Mashaw's theorising has attempted to provide an answer to the question (raised by his definition of administrative justice) of the requisite qualities of a decision-making process that lead us to accept its decisions. I have contended that Mashaw himself does not confront the question directly but rather posits three modes of decision-making and expounds a distinctive justice argument for each. The argument of this chapter, on the other hand, is that there are common qualities (of accuracy and fairness) which form normative demands upon administrative agencies, and that if an agency wishes to claim a 'justice argument' for its operations, then it must satisfy both these demands. The implication of the analysis so far is that accuracy and fairness are flexible concepts; within the three approaches to decision-making identified they may have contextualised meanings which display important differences. To develop further (and as a prelude to an elaboration of the concepts of accuracy and fairness), I wish to examine the approaches to decision-making underpinning Mashaw's three models. These approaches constitute an element of three types of 'decision-making system' within which different types of 'decision criteria' are adopted as the means of producing decisions. Part III addresses these issues.



### Part III - DECISION-MAKING PROCESSES; DECISION-MAKING SYSTEMS

One of the strengths of Mashaw's analysis is his identification of three distinct approaches to the organisation of welfare decision-making. Within each of these approaches it has already been suggested that the meanings of accuracy and fairness may display important differences. The purpose of this section is to elaborate three ideal type models of decision-making systems based on these approaches, which I will call 'legal' (based on the Moral Judgement model), 'administrative' (drawing on Bureaucratic Rationality) and 'professional' (drawing on Professional Treatment).

#### 1 - Decision-making processes

In the analysis which follows I wish to draw some clear distinctions between what I see as analytically separate elements which together comprise a total decision-making system. The essential constituent parts of a decision-making system are:

- (1) one or more decision-making processes
- (2) an organisational environment within which each decision-making process takes place

By 'decision-making process' I mean the application of some set of 'decision criteria'<sup>14</sup> to a collection of information or evidence. The distinction is analytical only; in practice the decision-making process takes place within an organisational environment which will itself be shaped partly by that process. Since this thesis is primarily concerned with the practice of decision-making, the notion of a decision-making process needs to be elaborated.

(a) The nature of decision-making

"Each phase in making a particular decision is itself a complex decision-making process... There are wheels within wheels within wheels."

(Herbert A. Simon, 1960, p.3)

In the discussion which follows I wish to suggest that all decision-making can be characterised by a generalised notion of the physical and mental activities which are undertaken by a decision-maker in producing a decision. I will call this generalised notion a 'decision-making process', which should be not confused with Mashaw's notion of 'decision process' which forms part of his definition of administrative justice.

As mentioned above, a decision-making process can be defined as the application of some set of 'decision criteria' to a collection of information or evidence. This should not be seen as a unitary process, however, the collection of information is in itself a separate and preliminary activity to the application of decision criteria. The two stages of a decision process can be represented thus:

- (1) information collection  $\Rightarrow$  a body of evidence
- (2) evidence + decision criteria  $\Rightarrow$  decision

Recognising the dual nature of the decision-making process is important since if our definition of administrative justice includes the desirable characteristics of the total process then each stage individually must also exhibit those characteristics.

Although 'evidence' and 'decision criteria' can be distinguished for analytical purposes, in practice they may be closely linked since the relevant evidence to be collected will be in part determined by the decision criteria. So, the decision criteria may not only provide the means of translating the evidence into a decision, but also act as a

kind of filter by defining what evidence the decision-maker is to consider (and possibly what to ignore). As formulated it can be seen that this generalised notion can encompass all three cognitive techniques from Mashaw's models; information processing, application of professional knowledge, and contextual interpretation are all alternative means of applying decision criteria to a body of evidence.

#### **(b) A typology of decision criteria**

In welfare decision-making there appear to be several kinds of decision criteria that are adopted as the formal means of making decisions: statute law, case-law, administrative rules <sup>(15)</sup>, and professional knowledge. In practice, however, there is another type of decision criterion which is relevant, although it is not sanctioned as a legitimate basis on which to make decisions, viz. a set of values or moral principles personal to a decision-maker.

Statute law, case-law and administrative rules share the similarity that they are essentially artificial constructs, ie they are formulated or constructed by some authoritative body or person. <sup>(16)</sup> Statute law (including primary legislation and Statutory Instruments) comprise a set of rules which have a special status within a legal system, conferring rights, duties, obligations, privileges etc. that can be enforced through a system of courts and ultimately by coercive measures. However vague or problematic they may sometimes be in practice, they have the advantage of being in written, publicly available form. Case-law refers to the legally binding precedents, interpretations etc. created by judges in Courts of law (or by specifically designated adjudicators, such as the corps of Social Security Commissioners), and which augments statutory legal rules. Administrative rules, in contrast, consist of those rules not contained in statutes but which have been devised within the law to enable those agencies responsible for some form of welfare provision to fulfil their primary function of allocating that benefit or service

as the legislation intended. Baldwin and Houghton (1986) have suggested a typology of administrative rules<sup>'17'</sup> which includes all rules, guidance, policy documents etc that are issued or used by an agency as a means of enabling it to produce decisions or take action in particular circumstances. Administrative rules are, in effect, additional substantive decision criteria to the relevant statutory legal rules. These rules are distinct from those which determine the process by which a decision is made, ie procedural rules.

Statutory or administrative rule-makers can amend or rescind the rules as they see fit, but unless the 'rules' allow, the decision-makers have no such option. For them the decision criteria are in effect given or fixed at the point of making an individual decision. Case-law is different in that, although it can still be thought of as an artificial construct, it provides additional decision criteria to statute law actually in the process of making a decision.

Professional knowledge, in contrast, is held to be a body of known phenomena and relationships, more discovered than created and therefore enjoying an existence independent of the decision-makers.<sup>'18'</sup> Professional knowledge constitutes a set of decision criteria and is only liable to change in the light of further discovery. Again, for the individual decision-maker, it will be fixed when a decision is required.

Personal value systems comprise a set of normative attitudes and beliefs which are neither discoverable phenomena nor the construct of an authoritative body. They are not fixed in the sense used above for rules or for professional knowledge, but, being personal to the individual decision-maker (whatever influences have shaped them) can be invoked or changed whenever he or she chooses.

(b) Formal decision criteria: rules and professional knowledge

Of the formal decision criteria, I wish to distinguish between those which comprise essentially a system of rules, ie statutory law, case-law and administrative rules, from those which comprise a body of professional knowledge. In a 'rules-based decision-making process' the outcome is prescribed by rules, whereas in a 'professional knowledge based decision-making process' professional knowledge is mobilised to respond to the particular circumstances of the individual. This difference is similar to the distinction between formalistic and purposive legal reasoning made by Unger (1976). Formalistic reasoning is the,

"... mere invocation of rules and the deduction of conclusions from them ..." (p.154)

Reasoning is purposive, however, when,

"... the decision about how to apply a rule depends on a judgement of how most effectively to achieve the purposes ascribed to the rule." (p.154)

Whilst acknowledging the point that Unger is arguing that rules can be treated in either a formalistic or purposive way, I wish to refer to rules in a more restricted sense in this discussion of ideal types of decision-making. I will make the assumption that rules are intended to produce an outcome by their application to a body of evidence, and are hence essentially formalistic in nature,<sup>19</sup> whilst professional knowledge is used to identify a desired outcome (or purpose) and to translate that outcome into a means for achieving it, and is therefore essentially purposive.

The rationale of the rules-based decision-making process is to produce a decision based on the rules whatever the effect of that decision - there is no other underlying objective to the process (this contrasts with the professional knowledge based process where the rationale is, as Mashaw suggests, orientated towards the requirements of the

individual citizen). The overall purpose of a rule is assumed to have been assimilated within it.

Having collected the evidence in the ideal-type rules-based decision-making process there is a single operation of applying the relevant decision criteria thus producing a decision. However, employing professional knowledge (again after the evidence has been collected) is characterised by a two-stage operation. In the first stage professional knowledge will be applied to the body of evidence to produce a definition of the individual's situation. This could be called the 'diagnosis' stage and produces an intermediate decision which might be the only decision of an individual decision-maker if, for example, he passes the case to another professional for the second stage. Stage two is intended to produce a 'response' to that diagnosis for which decision-makers will draw further upon their professional knowledge. The whole process can be likened to a problem-solving exercise where first the problem needs to be defined before a solution can be proposed. Although such a model finds familiar manifestations in, for example, medicine and social work, it would be wrong to characterise the professional knowledge based decision-making process as exclusively dealing with 'problems'; approaching a solicitor for advice on how best to organise one's financial affairs would fit equally well into the model. The rationale is to seek some desired change in the individual's situation; the decision that emerges from the professional knowledge based process is how to achieve that change and by definition should be in the individual's interest. So, the generalised notion of a decision-making process adapted to a system based on professional knowledge would appear thus:

(1) information collection  $\Rightarrow$  body of evidence

(2A) evidence + decision criteria (professional knowledge)  
 $\Rightarrow$  intermediate decision ('diagnosis')

(2B) evidence (diagnosis) + decision criteria (professional knowledge)  
 $\Rightarrow$  action to be taken (final decision)



**(c) Informal decision criteria: value systems**

In the public provision of welfare with which this study is concerned it is the formal models of decision-making that are adopted primarily as the means of allocating welfare. In the private sphere, however, the value system of an individual may play a large part in personal decision-making (although formal considerations may still be relevant); for example, decisions about whether to care for an elderly relative at home, or whether to contribute financially to a friend or neighbour in need. The importance of these value systems for the public sphere is that they may impinge upon or undermine the formal processes. This is particularly relevant where the formal decision criteria are not adequately defined to produce a decision in all circumstances, or where the organisational environment allows personal value systems to intrude unchecked. Prejudice, bias and victimisation can be the result although it is also possible that the individual citizen may benefit from preferential treatment or a sympathetic bending of the rules.

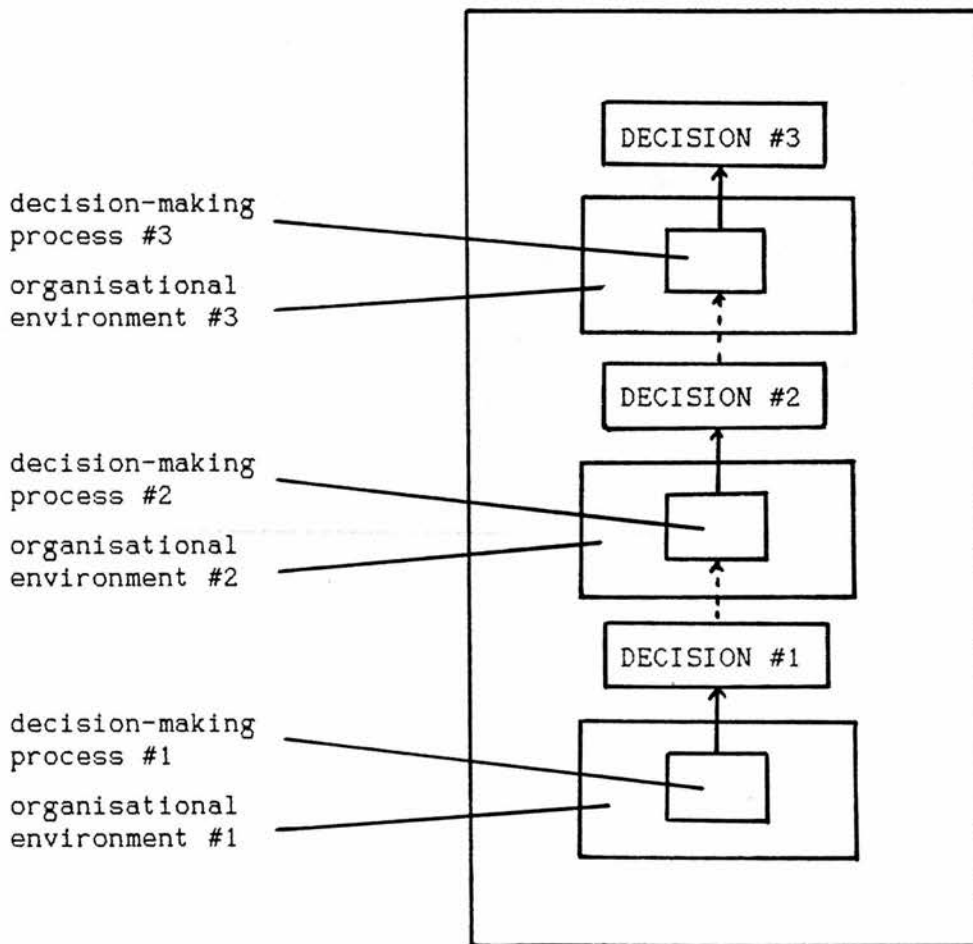
**2 - Decision-making systems**

In this analysis several types of formal decision criteria have been examined. Three alternative means are possible: case-law, administrative rules and professional knowledge. Since administrative justice concerns the relations between individuals and the administrative agents of the state, and since those agents only exist as creations of the state, ie they have been legislated into existence by Acts of Parliament, then regardless of the mechanism chosen for the point of delivery there will always be a legislative framework within which welfare agencies must constrain their activities (ie remain *intra vires*). However within this framework there will remain what Mashaw calls a 'gigantic policy space' (1983, p.9), which must be filled by some mechanism designed to produce individual decisions. Basing a decision-making system on each of these and their

relationship with an organisational environment, three different ideal types or 'models' of a decision-making system emerge.

Figure 2.2 illustrates the relationship in the legal model of a decision-making system based on case-law. The diagram shows, for illustrative purposes, three tiers in the decision-making system but there may be more; the essential point is that each tier is separate and that each decision-making process is carried out within a separate organisational environment connected by rights of appeal, defined themselves in the statutory legal rules. The decision-making processes may themselves be very similar, but are hierarchical in the sense that a decision from one tier may be overturned or superseded by the tier above.

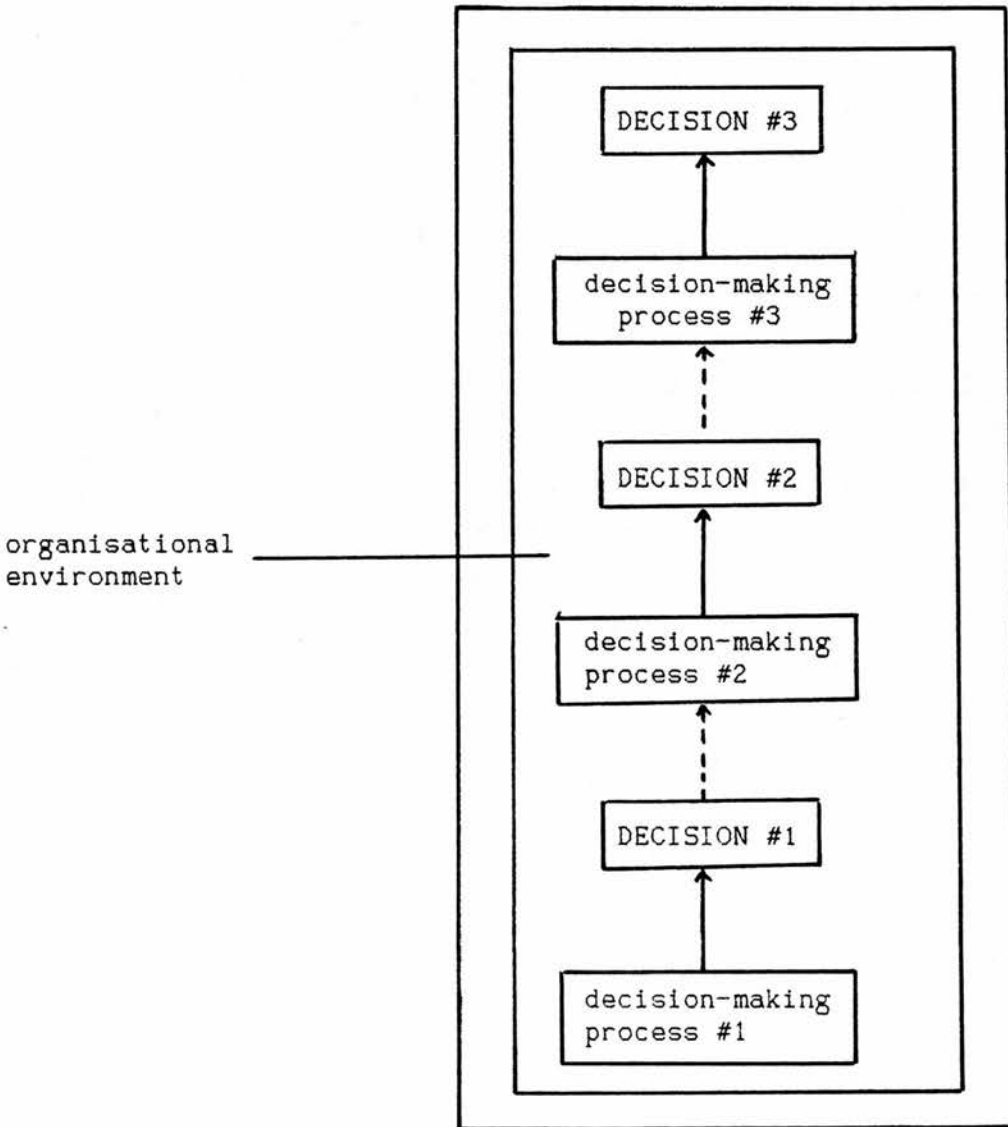
**FIGURE 2.2 - The legal model of a decision-making system**





The distinguishing feature of the administrative model of a decision-making system is its unitary organisational environment. There may still be a hierarchy of decision-making processes subsumed within it, but these represent tiers of internal administrative review, not the external and independent appeals structure of the legal model. Figure 2.3 illustrates this.

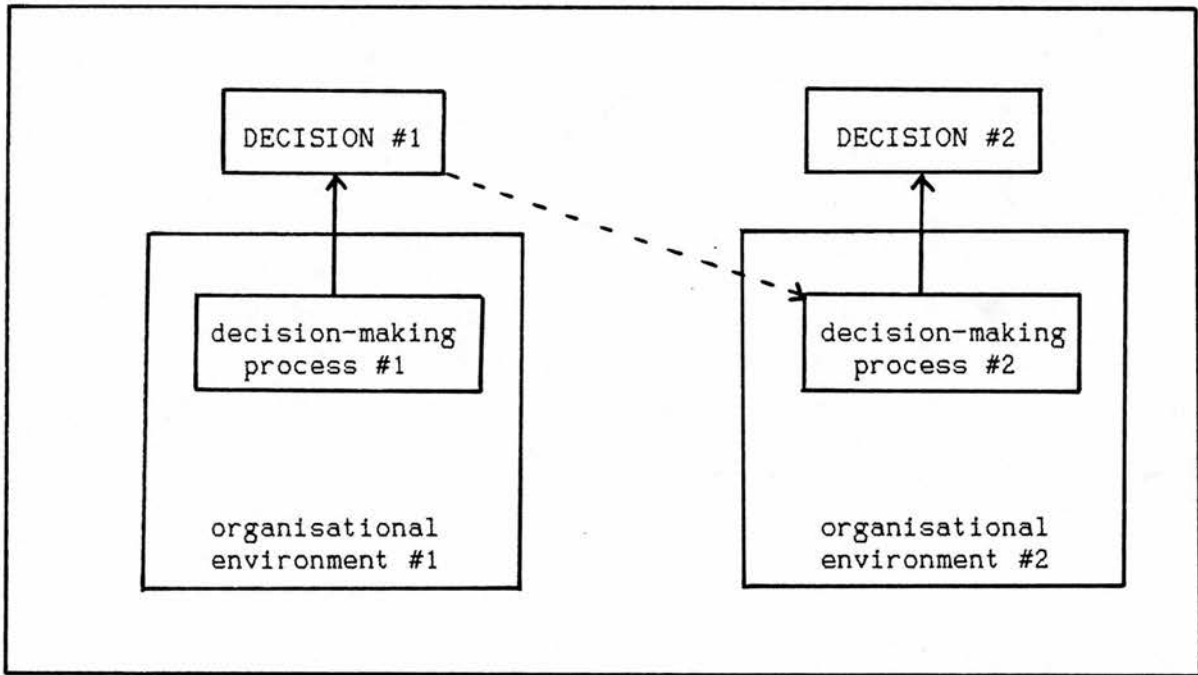
FIGURE 2.3 - The administrative model of a decision-making system



The professional model is different again, in place of an independent appeal or internal administrative review, non-hierarchical

professional peer review characterises the model. In effect consumers have a choice between decisions; if they are dissatisfied with an initial decision they are free to seek a 'second opinion', which may be sought within the same organisational environment or pursued elsewhere. There is no hierarchy of decision-making systems, however, a decision from one decision-making system only supersedes another in the sense that the recipient of the decision accepts it in preference to an earlier one.

FIGURE 2.4 - The professional model of a decision-making system



These three models of a decision-making system are presented as ideal types; they do not purport to describe the structure of decision-making within a practising welfare agency which may exhibit elements of two or all three types.



#### Part IV - ADMINISTRATIVE JUSTICE REVISITED

Having established the alternative models of decision-making based on the distinct decision criteria of case-law, administrative rules, and professional knowledge, operating within a framework of statutory legal rules, we can return to the problem of what constitutes the 'qualities' of a decision-making system, which make its decisions acceptable. The broad answer when approached from the perspective of the individual citizen was that administrative agencies should promise and provide accuracy and fairness.

For individual citizens, probably the most important aspect of their dealings with an administrative agency is the substantive decisions that they receive. Since this decision will emerge from one of the decision-making processes within a decision-making system I will argue that the primary demand of administrative justice is that a decision-making process produces accurate decisions, ie the right ones in the individual's circumstances. The secondary demand, therefore, will be that the individual must be satisfied that he is treated fairly in the decision-making process. 'Fairness' is something of a vague notion but, as I will elaborate later in this section, it comprises four elements: promptness, in reaching a decision, impartiality on the part of the decision-maker, participation of the individual in the decision-making process, and accountability for the decision to the individual. (20)

Accuracy refers to the substantive outcome of a decision-making process, whilst fairness refers to the process itself. As demands of administrative justice, they are both relevant to all tiers of the hierarchy of decision-making processes within a decision-making system. The empirical element of this study, however, is concerned principally with the first tier of the DHSS decision-making system; an assessment of whether higher tiers conform to the tenets of administrative justice must therefore remain unexplored in this thesis.

The two demands of accuracy and fairness are closely linked since, although fair treatment is a demand in its own right, it can also be seen as a means of promoting and demonstrating accuracy. To take the analysis further I will expand upon what 'accuracy' and 'fairness' mean for the legal, administrative and professional models of a decision-making system.

## 1 - Accuracy

Mashaw provides a useful definition of accuracy in relation to social security when he describes it as:

"... the correspondence of the substantive outcome of an adjudication with the true facts of the claimant's situation and with an appropriate application of the relevant legal rules to those facts." (1974, p.774)

This definition illustrates well how an 'accurate' decision relies on the two activities of the decision-making process, ie the collection of information and the application of the decision criteria, in this instance legal rules. It would apply equally well, *mutatis mutandis*, to a decision-making process based on administrative rules or professional knowledge. For example, in the provision of medical treatment an 'accurate' decision will mean the response most appropriate to a patient's condition in the light of his symptoms and the current state of medical knowledge.

The decision-making process must therefore be designed in such a way as to elicit the true facts. In the administrative model there is likely to be some definition, within the framework of statutory legal rules and within the administrative rules themselves, of what evidence is to be considered relevant (the 'evidence criteria'); hence the process of information collection must ensure that all that is relevant is in practice collected. In a professional knowledge based system the emphasis will be on decision-makers (ie professionals) to

elicit all the necessary evidence based on their professional knowledge and experience; there will be no precise definition of what will be relevant. Similarly, in the legal system based on case-law, evidential requirements will not necessarily be specified, but be open to the interpretations of any parties involved in the decision-making process.

It is essential, therefore, that those acting as decision-makers are competent to carry out the task of decision-making, ie they must have the requisite ability, knowledge and skills to be able to produce accurate decisions. The organisation, therefore, has a responsibility for selecting people with sufficient basic ability (for example, literacy and numeracy), and training them in the knowledge and skills necessary for the task. Thereafter it must check and maintain the decision-makers' competence by monitoring their work and keeping their knowledge up-to-date.

Whatever the information collected and the decision criteria in question decision-makers will require a certain amount of time in which to apply the latter to the former. This may be a matter of seconds if, say, it is deciding the age of a potential recipient or a matter of hours if it entails assimilating a complex mass of evidence and decision criteria. The amount of time that decision-makers have for the task will be partly (and probably significantly) influenced by the organisational environment in which they work. If they are allocated less than adequate time, then more inaccurate decisions will result as short-cuts are taken (for example, incomplete information collection, superficial scrutiny of the evidence, or uncritical application of the decision criteria) in the attempt to clear workloads.

Accuracy cannot be achieved by ill-trained staff operating with insufficient resources to perform the job. Since decisions emerge from a decision-making process operating within an organisational

environment the responsibility for producing accurate decisions rests partly with the decision-makers and partly with the organisation.

However, there will not necessarily be only one organisational environment that can be designed to make accurate decisions; in practice there could be many. What is important is that each organisational environment recognises and responds to the demand that it produces accurate decisions. (21)

## 2 - Fairness

'Fair treatment' as the second general demand of administrative justice on a decision-making system will comprise four elements:

- (a) Promptness - requiring that individuals receive prompt decisions
- (b) Impartiality - requiring that decision-makers do not allow feelings of bias or prejudice to impinge upon the decision-making process
- (c) Participation - requiring that individuals are given every opportunity to take an active role in the process and in particular present all the evidence they wish to support their positions, and respond to evidence supplied by others
- (d) Accountability - requiring that individuals receive a comprehensible explanation of the decision-making process and of the final decisions reached

As mentioned earlier, fairness is not only a demand of administrative justice per se but can also promote accuracy, in that impartiality, participation and accountability support the search for the 'true facts' and the appropriate application of the decision criteria which

lie at the heart of Mashaw's definition of accuracy. Furthermore, each of these may themselves promote and support each other (for example, accountable decision-making might encourage the decision-maker to be impartial and to seek the participation of the service recipient). Promptness, however, must be treated differently; it is an important demand in its own right but if too great an emphasis is attached to it then impartiality, participation and accountability can be undermined as short-cuts are taken, as a consequence of which accuracy also becomes vulnerable. The four elements of fairness are treated more fully below.

#### (a) Promptness

The question of the time taken to produce a decision is fraught with difficulties and probably incapable of satisfactory resolution. As a starting point, the maxim quoted by Nonet (1969, p.211) has a simple and persuasive force: "Justice delayed is justice denied". This would be axiomatic if the delay in providing a welfare service is, say, a period of years. But if the 'delay' is a matter of months or weeks, can one automatically say that justice is being denied? If a decision on a social assistance benefit is delayed by weeks or months then this would probably be considered a denial of justice since it may represent for the claimant his or her only source of income, a long wait for which will probably cause hardship and possibly harm. But a decision that relied on the accretion of evidence over a period of time (as, say, in the diagnosis of certain illnesses) may unavoidably be 'delayed' and may, if made earlier (ie on less than the complete evidence), be potentially harmful. In such circumstances the long wait for a decision would probably be considered acceptable. The question can only be decided on grounds of 'reasonableness' which in some cases can appropriately be translated into substantive time limits but in other cases not.



A possible interpretation of Nonet's maxim is that a decision should be made as soon as possible and without delay, where 'delay' implies an interval of time where the case is receiving no positive attention either within the administrative agency or outside. Again, though, avoiding delay applies both to the collection of information and the application of the decision criteria, and it is frequently in the former activity that most delay, as defined above, actually occurs. Waiting for a reply to an enquiry sent to an employer, awaiting the results of a pathology laboratory test, or awaiting a psychiatric report cannot, therefore, be considered a delay on the part of the decision-maker; having the case lying idly on a desk without making the necessary enquiries, or after the required information has been received does constitute an unproductive period and thus can be considered delay.

#### **(b) Impartiality**

The essence of the demand that the decision-making process is conducted impartially is that all sentiments of bias or prejudice on the part of the decision-maker must have no bearing on the decision arrived at (Robson, 1928, p.214; Franks, 1957, para. 24). And since bias and prejudice are manifestations of an individual's value system we can say that it is the exclusion of that value system that is required. The difficulty in this has been recognised by Robson:

"Continuous mental effort to suppress or exclude rigidly all subjective considerations of an emotional kind tends ... to create methods of reasoning that are 'artificial' in the sense that they demand an unnatural objectivity and the suppression of a large number of important instincts."  
(1928, p.214)

Although Robson and Franks were both concerned with rules-based systems their strictures are equally applicable in a professional context. Nevertheless, since one of the characteristics of a professional knowledge based system is that it seeks ultimately to

benefit the recipient there is a place for a sympathetic treatment of the individual in the sense that the purpose of the decision-making process is to benefit or help the recipient in some way. Hence, impartiality must be seen as a fairly narrow notion concerned with the exclusion of bias and not extended to the entirely appropriate feelings of sympathy by a professional worker for an individual's circumstances.

Bias and prejudice can intrude at all stages of the decision-making process; for example, in the collection of information, in the sifting of the evidence, in the application of the decision criteria, or in the personal treatment of the individual. One response to this phenomenon would be to design the decision and evidence criteria in such a way that value systems are squeezed out. Other methods relate more to the elements of participation and accountability, ie since bias seems to flourish in dark, secluded areas it can be thwarted by imposing an open approach of involving individuals in the decision-making process and explaining to them the basis of decisions taken.

### **(c) Participation**

"In one way or another one constantly confronts the claim that the dignity and self-respect of the individual can be protected only through processes of government, and particularly processes of adjudication, in which there is adequate participation by affected interests."

(Mashaw, 1983, p.95)

Whilst it is in this sense that participation in the decision-making process is a demand of administrative justice in its own right, it is also desirable in a more functional sense as a means of promoting accuracy. If we consider Mashaw's definition of accuracy we can see that eliciting the 'true facts' of a case is a prerequisite for accurate decision-making. So, the difficulties encountered in the decision-making process over the evidence, such as incomplete, unclear or contradictory evidence (see below, p.71) can be overcome in part

through the active involvement of the individual service recipient in the information collection stage since he or she is likely to be the principal source of that information. The individual will often be in a vulnerable position since he or she may not understand fully the requirements of the decision-maker or the significance of certain pieces of evidence, and hence may unintentionally give unhelpful or misleading answers to enquiries about evidence. Participation in the process should therefore not only ensure a higher quality of evidence on which to base a decision but also serve to convince individuals that a decision is accurate in their particular circumstances (ie increase the 'acceptability of the decision process').

Ganz (1974) admirably sums up the importance of participation in her conclusions to analysis of planning mechanisms, but they are equally applicable to welfare decision-making systems.

"It is necessary to involve people more directly in decision-making if their active co-operation rather than passive resistance is to be enlisted. There is more scope for this in the process leading up to a decision than at the level of decision-making itself. Open consultation enables the individual to have his point of view considered and weighed against other considerations." (p. 112)

#### **(d) Accountability**

Like participation, accountability, as a demand of administrative justice, serves a dual purpose. Firstly, it is desirable, per se, that individuals understand why certain decisions have been taken about them in order that they can be convinced of their acceptability. And secondly, if decision-makers carry out the decision-making process in the knowledge that they must account for their decisions, then they will be encouraged to be diligent and assiduous in the task. Robson (1928, pp.208-210) has admirably captured the importance of accountability.

"The obligation to give reasons for the conclusion may have an important influence, not only in persuading those who are

affected by the decision that it is a just and reasonable one, but also in developing the mental capacity and sense of fairness of the adjudicator."

"There is a lack of conviction, an apparent arbitrariness, about a decision which is unsupported by an account of the reasoning process on which it was based..."

"The reasons, like the decisions, may be good or they may be bad, the premises from which the argument starts may be false or true, the influences unwarranted and cause confused with effect; but the obligation to evolve a chain of reasoning which must stand the strain of criticism and discussion, is desirable from the point of view of promoting a sense of the judicial spirit in the adjudicator no less than in imparting certainty into the body of the law."

As with the other elements of administrative justice there is nothing startling or new about articulating accountability as a desirable feature of a decision-making process. Yet thirty years after Robson, the Franks Committee felt the need to reiterate the importance of giving reasons for decisions in its discussion of 'openness' in the operation of administrative tribunals:

"... openness appears to us to require the publicity of the proceedings and knowledge of the essential reasoning underlying the decisions..." (1957, para 42)

"... a decision is apt to be better if the reasons for it have been set out in writing because the reasons are then more likely to have been properly thought out." (para 351)

Nonet also argues strongly for the need for accountability where a decision is not self-evident but must rely on choices made by the decision-maker (ie where discretion must be exercised).

"Accountability to rules does not necessarily reduce discretion; rather it disciplines its exercise by imposing on the decider a duty to establish a reasoned relation between his judgement and recognised authoritative standards." (1969, p.236)

The argument for accountability is reinforced strongly in an unreported Commissioner's decision, CA 1/72, quoted by Lister (1974, p. 30),

"... in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant looking at the decision should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority; ... a decision based, and only based, on a conclusion that the total effect of the evidence fails to satisfy, without reasons being given for reaching that conclusion, will in many cases be no adequate decision at all."

The case for accountability need not be laboured further. However, the analysis of decision-making presented earlier suggests that the demands of accountability should be satisfied not only for the final decision but also for the information collection stage of the process, ie individuals should receive explanations why certain information is required (or is to be considered irrelevant) and what use will be made of it.

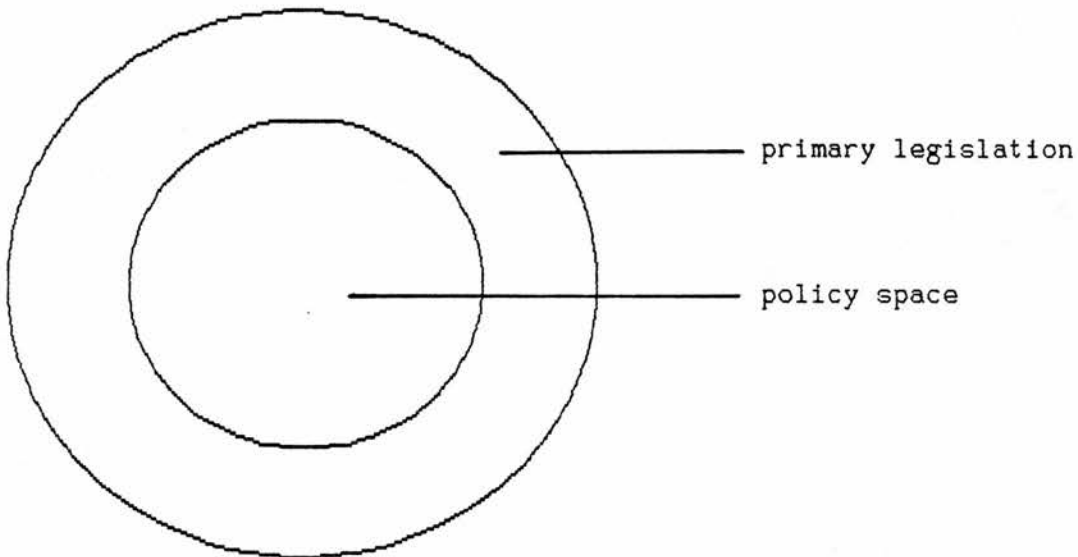
## Part V - SOURCES OF UNCERTAINTY IN WELFARE DECISION-MAKING

### 1 - Decision criteria at the macro-level of a welfare service

From the analysis so far we can say that at the point of delivery a welfare service may be provided according to one of three decision-making processes based on either case-law, administrative rules, or professional knowledge operating within a framework of statutory legal rules. Which of these will be adopted for the delivery may in part be directed by the nature of that service but also by other, political considerations. In practice, of course, the choice of delivery is often a mix of two or all three types. For example, the desired allocation of welfare may be achieved primarily by giving defined groups of people legal rights which may be progressively elaborated in case-law (as in most of social security), by delegating the allocation principles to an agency (such as the allocation of housing by local authorities) or by passing responsibility to an occupational group who can exercise their professional competence (as in health care delivery).

A statutory framework rarely, if ever, exhausts all the possible combinations of decision criteria and evidence, nor prevents ambiguities in either. There will always remain a 'policy space' (Mashaw, 1983, p.9) within the framework from which substantive decisions must be made about how individuals receive a particular welfare service. To adopt a pictorial representation (with acknowledgement to Dworkin's doughnut metaphor<sup>(22)</sup>) we could say that the policy space is the area inside an outer ring representing a legislative framework (the primary legislation) within which a service is to be administered.

FIGURE 2.5 - The welfare system 'doughnut'

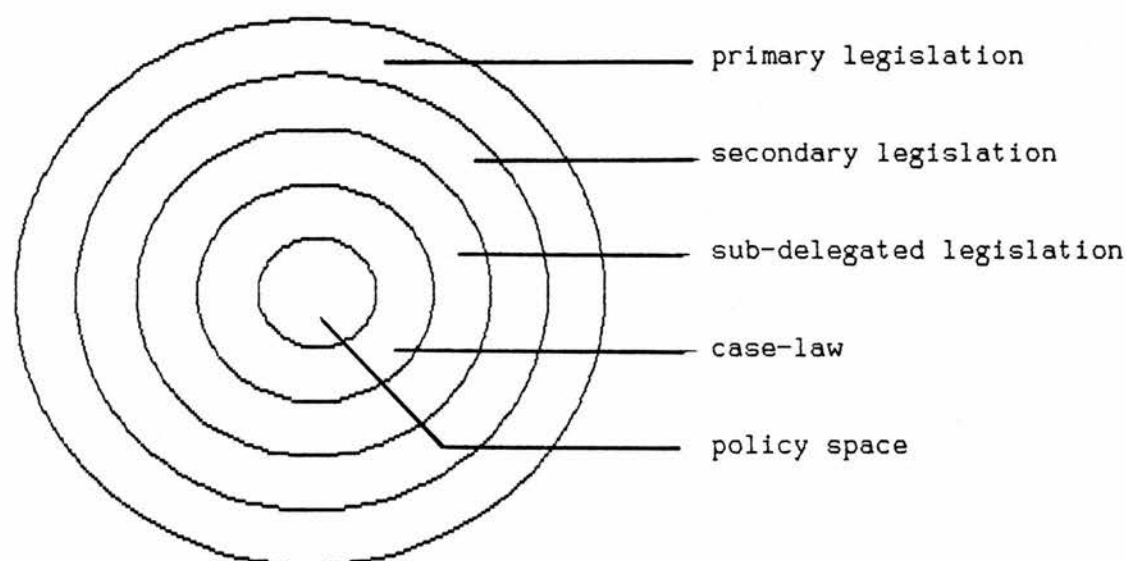


The total area of the doughnut (outer ring plus policy space) represents the circumstances within which decisions concerning the allocation of welfare will take place. A decision may emerge from the outer band, ie when primary legislation provides all the necessary criteria on which to base a decision, but if that is not the case then it will fall within the hole in the centre of the ring. If Figure 2.5 was drawn to scale for a particular welfare service, the outer band might be relatively thin (an example might be health care delivery) or relatively broad (as in, for example, the provision of social security) and as a result the 'policy space' may be respectively large or small. The problem for the architects of a welfare service is how to ensure that decisions emerge from the policy space in accordance with its overall objectives. To develop this discussion further I wish to examine ways in which the policy space is filled in practice, ie follow how a mixture of case-law, administrative rules, and professional knowledge can all operate within the space, rather than pursue the development of the 'pure' ideal types. In either a rules-based or professional knowledge based system there is almost invariably a need for secondary legislation (for example, regulations contained in Statutory Instruments), which can be thought of, pursuing the doughnut metaphor, as an inner ring of further statutory legal



rules within the outer band of primary legislation. And indeed there may be a body of sub-delegated rules within this ring (for example, where a Government Minister is empowered by primary or secondary legislation to make them). In practice, welfare provision will often combine the two; indeed since all public welfare provision is administered within some form of legislative framework all professional knowledge based systems will be an admixture. The modified Dworkinian doughnut, therefore, assumes a rather un-doughnut configuration as the policy space becomes successively smaller as more layers of decision criteria are added in the policy-making process, as Figure 2.6 below illustrates. The outer rings of legislative rules are by no means fixed or static but may change over time either through further legislative rule-making or by the effect of case-law which may impose a particular interpretation of a rule (thereby limiting the choices of a decision-maker and hence the policy space).

FIGURE 2.6 - The welfare system: the layers of decision criteria

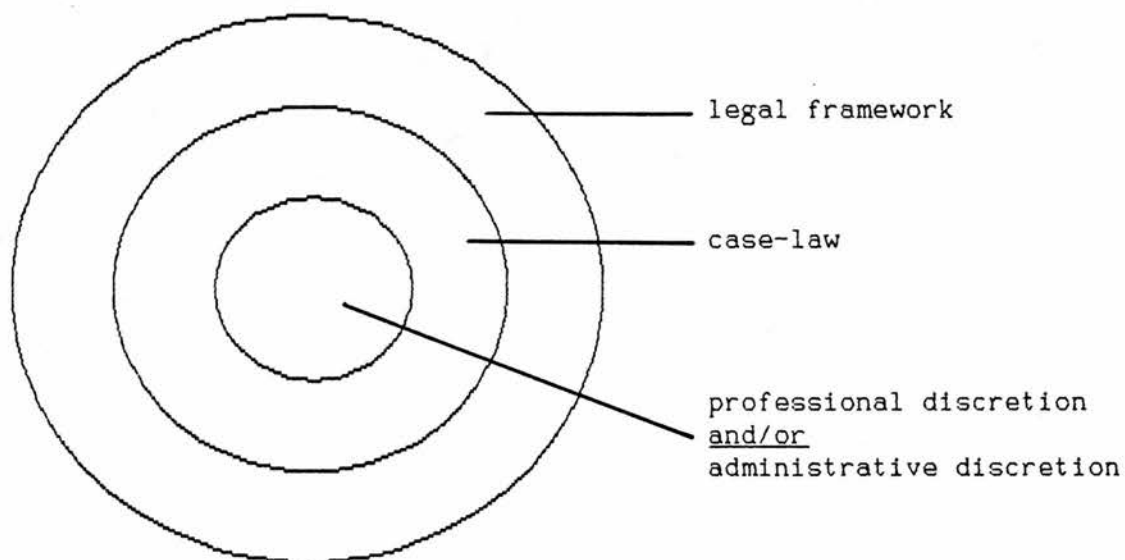


In the ideal type of the legal decision-making system, the policy space should progressively be filled case-law created by authorised

adjudicators exercising their legitimate legal discretion. But whilst case-law may limit the size of the policy space, it may also be filled, in an actual administrative agency, by the adoption of a set of administrative rules, constructed by the agency itself, or alternatively, the nature of the service might dictate that administrative rules are inappropriate and that decisions should be made according to professional knowledge. (And a further combination might comprise professional knowledge operating within some set of administrative rules.) Where decisions are allowed to emerge according to professional knowledge we can say that an area of professional discretion exists. In contrast, where professional knowledge is not involved there may still be a residual policy space bounded by successive layers of legal and administrative rules which we might consider the area of administrative discretion.<sup>(23)</sup> The alternative strategies will therefore produce distinctive versions of Figure 2.6 (see figure 2.7 below).

(NB for the sake of clarity primary, secondary and sub-delegated legislation have been subsumed in the outer band of 'legal framework')

**FIGURE 2.7 - The place of discretion within the welfare system**



## 2 - Discretion: the inevitability of making choices<sup>(24)</sup>

Within the literature of administrative law and social policy there are numerous analyses of the concept and practice of discretion.<sup>(25)</sup> It is an important, though seemingly elusive, concept and central to a consideration of administrative justice. At a high level of generality the definition formulated by K.C. Davis (1971) has been influential and has formed the starting point for many examinations of discretion; it is enduring in its clarity and comprehensiveness.<sup>(26)</sup>

"A public official has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction."

Whilst this sentence forms the core of Davis's definition of discretion (and is usually cited in isolation) there is an equally cogent observation which follows,

"Discretion is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary factors."  
(1971, p. 4)

Endorsing Davis's definition does not mean that one necessarily also embraces his commitment to reducing 'unnecessary' discretion by means of "confining, structuring and checking" it. It is possible to come away from Davis's analysis (as Baldwin and Hawkins (1984) warn) with the impression that discretion is, per se, a bad thing and the source of a great deal of injustice. This is perhaps unfortunate since it burdens discretion with strong pejorative connotations which can be hard to shed,<sup>(27)</sup> and which detract from its positive aspects (Titmuss, 1971).

Whether the existence of discretion is a problem and, if so, how far it can be resolved by identifying, as Davis suggests, the right balance between rules and discretion is not the main concern here. Rather, I wish to establish how discretion arises in welfare decision-making and its consequences for decision-makers and clients.

Davis's definition clearly emphasises that a central characteristic of discretion is choice. But what has failed to satisfy later analysts is that a definition which is so broad encompasses virtually all decision-making since it is rare that making a decision does not involve some element of choice. However, I would argue that the generality of the definition is not a weakness but its initial strength, allowing the possibility of developing a some kind of typology of different forms of discretion. Particularly important is Dworkin's (1977) differentiation between 'strong' discretion and his two senses of 'weak' discretion. 'Strong' discretion exists, argues Dworkin, where a decision-maker has no standards to apply in making a decision but must to an extent construct his own. This contrasts with the situation where standards do exist but nevertheless require some element of judgement or interpretation by the decision-maker, which is Dworkin's first sense of 'weak' discretion. The other form of 'weak' discretion occurs when an official has the final authority for making a decision which thereafter cannot be altered or set aside by another official. Whilst this second 'weak' sense of discretion is not frequently found in the provision of welfare services (since most decisions are reviewable<sup>(28)</sup>) the first 'weak' sense and the strong sense of discretion offer a useful insight into the different manifestations of the concept.<sup>(29)</sup>

Bull (1980) makes another useful distinction, between 'agency' and 'officer' discretion, the former referring to the discretion exercised by an administrative agency in directing and advising its officials, and the latter to the activities of the officials themselves. As an example of the confusion that often surrounds a discussion of discretion, one can cite Bull's attempt to divide these activities of officials into discretionary action on the one hand and the exercise of judgement on the other. Interpreting rigid rules and taking decisions in areas where it is deemed inappropriate to have such rules Bull considers to be two activities which necessitate the use of judgement. In contrast, departing from those rules in exceptional circumstances he considers the use of discretion. To take a Dworkinian view, however, interpreting

rigid rules would clearly require the exercise of 'weak' discretion, and making decisions in the absence of rules would require 'strong' discretion. The confusion between discretion and judgement is not just one of semantic nicety since the prescriptions offered by commentators often depend upon how they define or categorise certain official behaviour; somehow exercising one's judgement is seen as more acceptable than the exercise of discretion with its negative connotations of manipulation, exploitation, arbitrariness, uncertainty and intrusiveness (Goodin, 1985). In this thesis, however, I do not wish to make a clear distinction between discretion and judgement, since however one chooses to define them, they both involve the necessity of making choices. Therefore, any discussion of the problems inherent in the process of making choices should subsume problems of 'discretion' and 'judgement'. Nevertheless, it is still acknowledged that there is a powerful rhetoric associated with discretion and judgement, such that how 'making choices' is labelled is important in influencing responses to it.

Since discretion is a product of the need for administrative agencies to make decisions, it is implicit that an official empowered to make choices about an individual's welfare has a degree of power vested in him or her over that individual.<sup>(30)</sup> Galligan (1986) embraces this notion in his attempt to identify a 'central sense' of discretion adopted by officials, in response to what he sees as previous failures to define discretion with any analytical precision (and here he includes Dworkin's strong/weak distinction). As he writes,

"A central sense of discretionary power may be put as follows: discretion, as a way of characterising a type of power in respect of certain courses of action, is most at home in referring to powers delegated within a system of authority to an official or set of officials, where they have some significant scope for settling the reasons and standards according to which that power is to be exercised, and for applying them in the making of specific decisions."  
(p. 21)



However, Galligan further notes that there are two other stages to decision-making apart from the settling of standards to be applied. A prior stage is the finding of facts and the final stage is the application of the settled standards to those facts. Both these stages involve imprecise and variable processes which may lead accordingly to variable conclusions. The autonomy concomitant with this uncertainty Galligan calls 'discretion in application'.

Although it appears that there is some similarity between Galligan's 'central sense' and Dworkin's 'strong' discretion and likewise with their respective 'discretion in application' and 'weak' discretion, the two analyses combined do suggest a potentially profitable way forward in the analysis of social security decision-making in practice. Firstly, it is clearly possible to postulate different categories of discretion (following Dworkin) which will exhibit varying characteristics; secondly a decision-making process frequently does comprise (following Galligan) analytically separate phases (although they may be blurred in practice) at which different types of discretion have more relevance. Partly because of the lack of clarity surrounding the concept of discretion and partly because of its pejorative connotations, I wish to place the emphasis in the remainder of this thesis, not on discretion but on choice in decision-making. As Davis points out, choice of alternative courses of action occurs at all stages of the decision-making process not just at the end when choices about outcomes may be required (which is perhaps most often referred to as discretion) but in selecting the evidence to consider, interpreting possibly confusing, conflicting or incomplete evidence, deciding which decision criteria to apply etc. Why it is important to concentrate attention on this large range of choices is that they all have a potentially significant bearing on the outcome of the whole process; what might seem to be a minor decision early on (for example, not to check a piece of evidence) may have an unanticipated and crucial bearing later. If there has been a negative side effect of analyses of discretion in theory and in practice, it has been to direct attention away from the entirety of a decision-making process

and on to the final phase, the choice between outcomes. One aim of this thesis is to illustrate how important it is to redress this balance.

So, by drawing on the insights of Dworkin and Galligan, and by adopting Davis's definition of discretion and particularly its emphasis on choice, we have a possible method of exploring the prima facie complexity of social security decision-making at the front line, ie of examining the elements of the process empirically and identifying where choices (or 'officer discretion' in Bull's terms) are necessary, the nature of those choices, who makes them, and how they are made.

### 3 - Decision criteria and choice at the micro-level of individual decisions

It can be seen that the most useful exploration of administrative justice in the social security system will necessitate consideration, at the micro-level of individual decisions, of the operation of statutory legal rules, case-law, administrative rules and professional knowledge (and, by implication, administrative or professional discretion). Only then, by aggregating the results of this exercise can any conclusions be drawn about the whole system. The next stage of the analysis, therefore, will be to examine the decision-making process more closely and identify where choices arise.

Returning to the generalised notion of the decision-making process as the collection of evidence and the application of decision criteria we can see how areas of discretion emerge. Both the decision criteria and the evidence can either be clear, with no ambiguity, or unclear in some way and hence necessitating, to some degree, interpretation (ie making a choice between possible different meanings of the decision criteria). In general, figure 2.8 illustrates the possible outcomes for the decision-maker of being confronted with clear or unclear evidence and decision criteria. This interaction between the evidence and the decision criteria will apply equally to decision-making process based on



statutory legal rules, case-law, administrative rules or professional knowledge.

FIGURE 2.8 - The interaction between the decision criteria and evidence in the decision-making process

		<u>EVIDENCE</u>	
		Clear	Not Clear
<u>DECISION CRITERIA</u>	Clear	(1) Routinised decision- making	(2) Questions of relevance and validity of evidence
	Not Clear	(3) Interpretation of decision criteria	(4) Both evidential and interpretive questions

If we consider a rules-based decision-making process certain features of decision-making in practice can be identified. In box (2) several explanations may be proffered for problems with the evidence; the evidence itself may be difficult to interpret, it may be incomplete, it may be contradictory in some way, or it may be of doubtful veracity. Thus the decision-maker will be faced with a series of questions about what exactly constitutes the evidence on which to base a decision. (31) In box (3) the decision criteria may specifically present the decision-maker with choices to select from, or alternatively the criteria may be difficult to interpret or capable of different interpretations. In box (4) decision-making is at its most uncertain, exhibiting problems from both boxes (2) and (3). It is only in box (1) where discretion can be considered to be eliminated, where a clear rule applied to clear evidence produces an unequivocal answer (an example might be where the

decision criterion is the age of a person which can be decided by reference to a birth certificate).<sup>(32)</sup>

For a professional knowledge based decision-making process problems will arise in a similar way from the interaction of unclear evidence and decision criteria. Box (2) represents problems such as the difficulties in the interpretation of symptoms presented to a medical practitioner or social worker (ie problems of 'diagnosis'). Box (3) represents difficulties in the interpretation of the current professional knowledge (ie problems of 'response' or 'treatment'). In box (4) both kinds of difficulty may be involved presenting the professional with problems of both diagnosis and response, whilst in box (1) the opposite occurs where the current state of professional knowledge indicates a clear response to a clear body of evidence (or 'symptoms').

If we turn again to the modified Dworkinian doughnut as the representation of a single decision-making process (and not of a welfare service in toto) what is happening in boxes (2), (3) and (4) for both rules-based and professional knowledge based decision-making processes is that the outer bands surrounding the areas of administrative discretion and professional discretion respectively do not provide the decision-maker with the necessary criteria on which to base a decision. The decision-maker must therefore appeal to other sources to assist him in making a decision.<sup>(33)</sup> In the case of social security administration there is a well-established structure for providing advice and guidance to decision-makers in areas of uncertainty or doubt (as well as informal systems comprising networks of associates); however, where these fail (or are ignored) the decision-maker is forced (or chooses) to refer to something outside this official system. It is at this point that the value system of the decision-maker is most likely to intrude, in effect providing a further set of decision criteria unintended by the architects of the welfare service or the administrative agency. And because each decision-maker will have his own value system comprising a unique mixture of attitudes, beliefs, preferences etc. it is when this

stage is reached in the decision-making process that making choices (or using discretion) inevitably attracts the charges of arbitrariness, uncertainty, exploitation etc.

In contrast, box (1) presents no problems for the decision-maker, with the happy conjunction of clear evidence and decision criteria.<sup>(34)</sup> And unless some errors have entered into the information gathering process then accuracy is assured. In effect, one might argue that no particular skills of decision-making are required at all in box (1) since there are no evidential problems or difficulties with the decision criteria. The decision-making task could equally well be accomplished by a computer.

#### 4 - Summary

It has been argued that there are two fundamental ways in which a decision-making process can be carried out in a welfare context, viz. via a formalistic system based on rules or a purposive system based on professional knowledge. The distinction was made between those rules which have statutory authority, those developed as case-law by authorised adjudicators, and those constructed *intra vires* by the relevant administrative agency to enable it to carry out its primary function of implementing welfare policy. Two basic patterns of legitimate welfare delivery therefore emerge; decisions can be produced by a combination of statutory legal rules, case-law, administrative rules and either professional or administrative discretion. Within each type of system, the uncertainties inherent in decision criteria and evidence result in the inevitability that decision-makers will be forced into the practice of making choices.

## Part VI - CONCLUSION

This chapter has attempted to develop an analysis of administrative justice building upon the insights provided by Mashaw.

The process of decision-making has been separated into its two essential elements of evidence and decision criteria and their interaction studied to identify how discretion (in the sense of 'choices') arises. By adopting Mashaw's definition of administrative justice, though not using directly the models that he develops from it, the abstract decision-making process is posited as one element of a 'decision-making system' which also embraces an organisational environment. Three such decision-making systems are presented as ideal types, each based on a different set of decision criteria which operates within a framework of statutory legal rules, viz. case-law, administrative rules, and professional knowledge. Finally, the qualities that administrative justice demands of the decision-making system as a whole and of the decision-making process in particular have been examined.

The outcome of this analysis can be summarised as follows. Administrative justice is achieved if an accurate decision is produced promptly by a process in which the client has participated to ensure that all relevant information has been collected, and the decision-maker has applied the relevant decision criteria in an impartial manner, and that, at the end of the process, the decision-maker demonstrates his or her accountability by issuing a full explanation of the relation between the evidence, the decision criteria and the decision.

Whilst it may be admitted that this normative framework (like all normative theorising) has necessarily been developed from what MacCormick describes as 'unprovable propositions' (see ch. 1, p.14)

the same claim can perhaps be made for the elements of accuracy and fairness that Wade (1963) makes for the Franks Committee's endorsement of openness, fairness and impartiality as desirable criteria for administrative tribunals to adopt. As he writes,

"These are not legal technicalities. They sum up the ordinary citizen's feelings for justice and fair play..."  
(p. 71)

The analysis of administrative justice presented here provides a framework within which the operations of the DHSS in their administration of industrial disablement benefit and mobility allowance can be studied. Before this can commence, however, chapter 3 provides an introduction to the decision-making arrangements of the social security system, and chapter 4 explains the methods adopted for the empirical part of the study.

### CHAPTER 3 - AN INTRODUCTION TO SOCIAL SECURITY DECISION-MAKING

#### Part I - INTRODUCTION

As a prelude to the examination in detail of the operation of the administration of industrial disablement benefit and mobility allowance this chapter will spend some time describing and analysing the decision-making system from which individual decisions on social security claims emerge.

The present structure of social security adjudication dates from April 1984 with the implementation of the relevant parts of the Health and Social Services and Social Security Adjudications Act 1983 (the HASSASSA Act) which amended earlier legislation dealing with adjudication arrangements, ie the Social Security Act 1975 and the Supplementary Benefits Act 1976. The HASSASSA Act was the latest in a series of developments stretching back some twenty years which have been intended in part to introduce greater legality into parts of the social security system (especially supplementary benefit) and to move towards the rationalisation of the diffuse arrangements for producing decisions on claims for different benefits.

Whilst, with one or two exceptions, ' ' these new arrangements apply to all benefits, no specific references will be made in this chapter to supplementary benefit or unemployment benefit since, in practice, decisions on these benefits are dealt with either by a separate part of a DHSS local office (in the case of supplementary benefit) or by officials of the Department of Employment (for unemployment benefit). Instead discussion will concentrate on the benefits chosen as the focus for this study, mobility allowance and industrial disablement benefit.

Part II will examine the structures of decision-making within the social security system and in particular the dual systems of lay and medical adjudication. This will include a brief consideration of the Office of the Chief Adjudication Officer (OCAO), the statutory body separate from the DHSS which is responsible for giving advice and guidance to adjudication officers, and for monitoring the standard of their decisions; and the Office of the President of Social Security Appeal Tribunals and Medical Appeal Tribunals (more conveniently known as OPSSAT) which deals with the administration of the appeal tribunal system. Deciding a social security claim is not always carried out entirely within the adjudication system, certain questions are designated for the Secretary of State (for Social Services) to decide. Hence, the reasons for this separation of decision-making duties and the relationship between the Secretary of State and the adjudication system will be examined. Part III describes briefly the organisational environment of social security decision-making, ie the size and structure of the DHSS. Part IV of the chapter will examine more closely the meaning of 'adjudication' and its place within the total decision-making process before discussing how the decision-making arrangements relate to the demands of administrative justice identified in chapter 2.



## Part II - THE ADJUDICATION SYSTEM

In order to receive a social security benefit a claimant must be able to satisfy the eligibility conditions for that benefit. Failure to satisfy any one of these would lead to the failure of the whole claim. Deciding on a claim therefore is not a single, unitary exercise; the final outcome of a claim is more exactly an aggregate decision consisting of a series of what might be called sub-decisions, ie the decisions made on each of the individual conditions to be satisfied. These sub-decisions can be divided into two types, lay and medical, each of which has a distinct decision-making system.

Decisions on claims emerge from the formal 'adjudication system'. This comprises three tiers, called the 'independent statutory authorities', whose duties and responsibilities are contained in social security legislation.<sup>(2)</sup> On the lay side the first tier comprises adjudication officers who make the initial decisions. The second tier consists of Social Security Appeal Tribunals (SSATs) who decide cases where an appeal against the original decision has been made. The medical equivalents of these are the Adjudicating Medical Practitioner (AMP) and the Medical Appeal Tribunal (MAT) respectively. At the third tier the two systems merge; the Social Security Commissioners decide certain cases within their jurisdiction (ie those in which a point of law is at issue) on appeal from either of the tribunals. All three tiers act independently of the DHSS in that the Department has no say in the substance of the decisions being made. The DHSS does, however, have a responsibility for the implementation of social security legislation and hence its relationship with the statutory authorities is an important, albeit sometimes confused, one; it will be explored further later in the chapter.

The adjudication system can be represented thus:

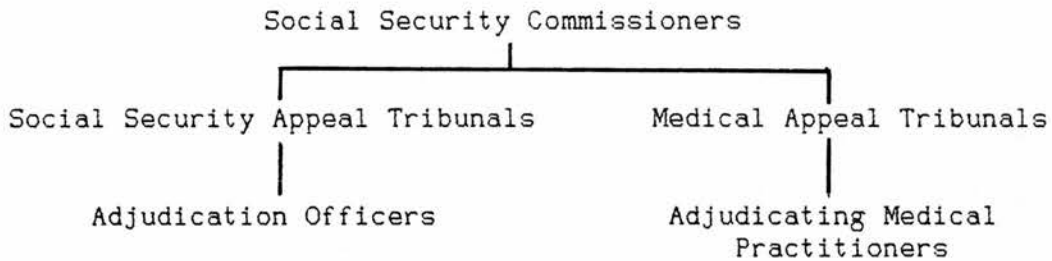


FIGURE 3.1 The social security adjudication system

The independent statutory authorities are responsible for deciding claims and questions put before them<sup>(3)</sup>, ie they must, on the information that is presented to them regarding a particular claim, take a decision on whether the requirements of the legislation are satisfied.<sup>(4)</sup>

## 1 - Lay Adjudication

### (a) The Adjudication Officer

The adjudication officer, as an independent official, decides claims and questions that are put to him in accordance with the current statute law (Acts of Parliament and Statutory Instruments) and case-law. He is not responsible to the DHSS nor to the Secretary of State for the substance of his decisions. If an adjudication officer is in difficulty deciding a particular case, or is in doubt about some aspect of the legislation he may call upon the services of the Chief Adjudication Officer (CAO) who is statutorily appointed to provide advice and guidance to adjudication officers and is also responsible for monitoring their standards of adjudication. The CAO is discussed more fully below.

**(b) The Social Security Appeals Tribunal (SSAT)**

If a claimant is dissatisfied with the decision of an adjudication officer he may ask for his case to be heard by the second of the three tiers of the adjudication system, the SSAT. The tribunal system has attracted a comparatively large amount of critical attention over the past fifteen or so years and partly as a result has been subjected to a series of reforms. At present an SSAT comprises a legally-qualified chairman and two other members. These are drawn from two separate panels, one for Chairmen and the other for lay members, compiled respectively by the Lord Chancellor (or, in Scotland, the Lord President of the Court of Session) and by the President of SSATs and MATs. Like the adjudication officer the SSAT must only concern itself with applying current statute and case-law to the evidence presented to it; governmental or DHSS policies should play no part in its considerations. Whilst the SSAT is primarily intended to provide a possible remedy for aggrieved claimants, adjudication officers can refer cases to it for an initial decision if, for any reason, they feel unable to make one themselves.

**(c) The Social Security Commissioners**

The third tier in the three-tier system comprises the Social Security Commissioners who must be barristers (or advocates in Scotland), or solicitors of at least ten years' standing. They decide cases that have been appealed by either the claimant or the adjudication officer after an SSAT has given its decision. Their decisions create the case-law of social security and the more important of them are 'reported', ie they are published and distributed to all three tiers of the adjudication system as well as being available to the public.<sup>(5)</sup> Under certain circumstances (ie on a point of law only) there lies a further right of appeal to the Court of Appeal (the Court of Session in Scotland).

## 2 - Medical Adjudication

### (a) The Adjudicating Medical Practitioner (AMP)

Members of the medical profession play a variety of roles in the administration of the social security system.<sup>(6)</sup> They may act in an advisory capacity in giving their professional opinion on the diagnosis of a claimant's condition (for example, to confirm that a claimant is suffering from one of the diseases prescribed in relation to industrial disablement benefit), or to support a claimant's contention that he is unfit for work (by issuing a medical certificate). Alternatively, they may act in an adjudicatory capacity as AMPs appointed by the Secretary of State, to make decisions on cases that have been put before them. The adjudication questions that are to be decided by AMPs are specified in the legislation and typically cover an assessment of a claimant's disability (according to a scale of percentage points) for the purposes of industrial disablement benefit and its related additions (such as special hardship allowance), and also severe disablement allowance.<sup>(7)</sup> In most cases the AMP will act alone (often referred to as a 'single doctor Board') but occasionally, in cases which are so specified in legislation, the Board must comprise two AMPs.<sup>(8)</sup>

Unlike the lay side of adjudication there is no advice and guidance structure designed to assist an AMP in difficulties, neither is there an independent organisation comparable to the OCAO which has a responsibility for monitoring standards of adjudication. Training of new AMPs (and keeping existing AMPs abreast of new developments) is undertaken by full-time medical staff of the DHSS located in the Regional and Central offices. Advice on the Industrial Injuries (II) scheme is available in the II Handbook but there is no comparable document for doctors when acting in an advisory role in relation to other benefits. Medical adjudication (and some advisory assessments)

are either carried out in one of the 100+ Medical Boarding Centres throughout the country or, occasionally, in the claimant's own home.

#### **(b) The Medical Appeal Tribunal**

An aggrieved claimant has a right of appeal to an MAT against the adjudicatory decisions of AMPs. An MAT comprises a legally-qualified chairman and two medical members who must be of consultant status. Their decision on medical assessments is final but an appeal can be made to the Social Security Commissioner on a point of law.

#### **(c) The Social Security Commissioners**

The Social Security Commissioners serve the same function in relation to medical adjudication as they do to lay adjudication, ie establishing the case-law of social security by deciding individual cases submitted to them by aggrieved claimants or by adjudication officers.

### **3 - The Office of the Chief Adjudication Officer, (OCAO)**

The OCAO, formed by the amalgamation of the Offices of the Chief Supplementary Benefits Officer and the Chief Insurance Officer in 1984<sup>(9)</sup>, is concerned only with first tier lay adjudication. It has three main functions: to report on the standards of adjudication to the Secretary of State and to keep under review the operation of adjudication and matters connected with it (for which purpose it operates a monitoring system), to provide advice and guidance to adjudication officers, and to prepare submissions for the Social Security Commissioners in cases where a claimant has appealed against a decision of either an SSAT or MAT. (DHSS, 1985e)

OCAO is situated in Southampton, and in mid-1986 employed 180 staff (all of whom are DHSS civil servants) under the Chief Adjudication Officer. The majority of the work is in one of the advice sections each dealing with a different benefit or group of benefits. Another section administers the adjudication monitoring system.

Each advice section provides advice and guidance to individual adjudication officers on the interpretation of social security legislation. As general assistance, OCAO publishes the 'S' Manual on supplementary benefit legislation and the Insurance Officers Guide (IOG) which covers all the other benefits; these are continually updated to take account of recent case-law, new regulations or responses to new difficulties.<sup>(10)</sup> In addition each section will advise on individual cases which have been submitted to them from local offices. In the DHSS Central Offices at North Fylde and Newcastle, the OCAO advice system is augmented by Principal Adjudication Officer (PAO) sections which also provide advice to adjudication officers.<sup>(11)</sup>

The formal advice structure for the individual adjudication officer is completed by his immediate superior in the local or central office, the Higher Executive Officer (HEO). The whole structure is intended to maintain the independent status of adjudication.

The monitoring section has the responsibility for preparing the Annual Report of the CAO on standards of adjudication which is submitted to the Secretary of State. In 1986, the section comprised two teams who between them visited 42 local offices and the two Central Offices each year to assess standards of adjudication; their reports form the basis of the Annual Report. However, this is only the apex of the monitoring system; in each of the seven Regional Offices there are two or three teams who, although not OCAO staff, carry out monitoring visits on the CAO's behalf. Using the same techniques and criteria as the Southampton teams they will visit every local office in their

Region every two years and submit a copy of their report to OCAO. The lowest tier of the monitoring system are the HEOs who carry out a routine, systematic check of adjudication officer decisions in the local office.

As a 'matter concerned with the adjudication system' the training of adjudication officers has come under the scrutiny of the CAO since it is an important influence on standards of adjudication. OCAO, therefore, vets all training material used by the various DHSS Training Centres throughout the country, as well as the contents of the self-instruction packages used for training within local offices.

#### **4 - The Office of the President of SSATs and MATs, (OPSSAT)**

OPSSAT was created in 1983 in response to the need (or desire) to reinforce the independent status of adjudication by taking over from the DHSS the administration of the appeal tribunals system. Headed by a senior judge appointed by the Lord Chancellor, OPSSAT is organised according to a presidential system similar to that adopted for other administrative tribunals.<sup>(12)</sup> As well as being responsible for the management of SSATs and MATs, OPSSAT also has a responsibility for training tribunal chairmen and members, and for ensuring that they have access to appropriate social security texts. To assist him in his duties the President has seven Regional Chairmen of Tribunals to whom he can delegate appropriate duties.

The rationale behind the presidential system is to remove any direct and obvious link between social security tribunals and the DHSS, and to concentrate experience and expertise relevant to both types of tribunal (Robson, 1979).



## 5 - The role of the Secretary of State in decision-making

Whilst I have described the formal adjudication system above this does not comprise the whole decision-making process. Although adjudication officers and AMPs take the majority of decisions on social security claims, there are certain questions defined in the primary or secondary legislation for the Secretary of State to decide. In practice, these questions will be delegated to an official of the DHSS. Such officials may also act as adjudication officers but in their capacity of representative of the Secretary of State are not part of the formal adjudication system. A claimant dissatisfied with a decision made by the Secretary of State does not have recourse to the normal social security appeals machinery. Instead he must make a case to the local office, or the Secretary of State himself. Alternatively he may, on a point of law only, contest the decision in the ordinary courts. Secretary of State decisions lie outwith the jurisdiction of the formal adjudication monitoring system operated by the OCAO.

Why there is this division between the adjudication officer and the Secretary of State in making certain decisions is unclear; Ogus and Barendt discuss the position with reference to decisions concerning National Insurance contribution conditions, which are made by the Secretary of State:

"There has never been any substantial argument for allocating these decisions to the Secretary of State, rather than the statutory authorities. It may be that there are some practical reasons as regards decisions on whether a claimant has satisfied the relevant contribution conditions. But it is not clear why the statutory authorities should not decide the related question whether a claimant should contribute as an employed or self-employed person. This involves difficult issues of law and fact which are suitable for a tribunal. Broader policy decisions in this area can, of course, be taken by the Secretary of State under his power to make regulations concerning the categorisation of earners. Nor is there any obvious reason why entitlement to the constant attendance and exceptionally severe disablement allowances<sup>(13)</sup> should be decided by him, while for other

additional allowances this is determined by the statutory authorities." (1982, p.585)

The Secretary of State's role in decision-making is not limited to taking specific decisions as directed by the legislation. Since it has been a long-established principle that adjudication officers decide cases on the papers put before them and that they should have very little, and preferably no, direct contact with the claimant, (intended to preserve the adjudication officer's independence and impartiality) the task of accumulating the information on which an adjudication officer can apply statute and case-law is undertaken by a Departmental official on behalf of the Secretary of State. Accordingly, it is the DHSS which designs forms and procedures necessary to elicit the relevant information. This stage of the decision-making process will be described and analysed in more detail in the subsequent chapters on industrial disablement benefit and mobility allowance.

### Part III - THE ORGANISATION OF THE DHSS

The DHSS employs in the region of 90,000 civil servants<sup>'14'</sup> most of whom are engaged in the administration of the social security system. 81,000 social security staff work in local, regional and central offices and the London Headquarters. These staff are divided approximately as follows:

TABLE 3.1 - Social Security staff working in Local, Regional and Central Offices

Local Offices	60,600
Regional and other offices	4,800
Newcastle Central Office and North Fylde Central Office	13,200
Other Computer Centres	600
HQ	1,800

Source: DHSS, 1985c, p.111<sup>'15'</sup>

As the figures above show the bulk of social security work of the DHSS is handled in the local offices where supplementary benefit, some maternity benefits, sickness and invalidity benefits, and the benefits of the Industrial Injuries scheme are administered. Of those employed in local offices the majority are engaged on the administration of supplementary benefit (38,000). Of the remainder 13,000 administer National Insurance (NI) benefits, 6,000 work on the collection of National Insurance contributions, and most of the rest undertake management functions. To complete the picture there are some 26,000 Department of Employment officials who work on unemployment benefit, 7,800 local authority staff engaged on housing benefit administration and 740 Inland Revenue officials working on contributions (DHSS, 1985c, p.111).

A network of over 500 local offices covers Great Britain, divided into seven administrative Regions: London (South), London (North), Wales and the South West, North, North West, Midlands, and Scotland.

## 1 - The Local Office

Although a few local offices deal only with either supplementary benefit or National Insurance benefits, the vast majority administers both and are now termed 'Integrated Local Offices' (ILOs). (All the offices visited in this study were ILOs.) However, within each ILO the work of the supplementary benefit and National Insurance sides of the office are still for the most part separate and distinct with little movement of staff between the two. Typically, two-thirds of the staff will work on supplementary benefit and the remaining one-third on National Insurance work (including contributions). The staff engaged on the latter work are commonly known as the 'CB side' (from Contributory Benefits), a title that originally distinguished them from the staff administering the means-tested supplementary benefit. It is now somewhat out-of-date given the increase in the range of non-contributory benefits introduced in the last twenty years (such as mobility allowance, attendance allowance and invalid care allowance).

The organisation of the CB side will vary according to the size of the office and the type of locality it serves. For example, the area covered by one inner city office visited generated very little industrial disablement benefit work which therefore required only one or two staff; in contrast, an office serving a coal mining district required nearly fifteen staff. Despite these variations the organisation of the CB side of the office does typically follow a pattern. An HEO will be responsible for a number of sections dealing with industrial disablement benefit, long term benefits (or 'LTB' - mainly retirement pensions), short term benefits (or 'STB' - mainly sickness payments) and contributions work. Each LTB and STB section will require adjudication decisions to be made on every claim and

hence one or more officers of the Local Officer I (LOI) grade<sup>'16'</sup> will be appointed as adjudication officers to make decisions on certain benefits. The remainder of each section will comprise mainly Local Officer IIs (LOIIs) who will process claims, ie receive and check claim forms as they arrive in the office, send out routine enquiries for information, attend to claimants visiting the office, carry out interviews, and notify and pay claimants. In addition, clerical assistants will perform such basic clerical tasks as copying information into casepapers, locating and putting away files etc. LOIIs and clerical assistants are employees of the DHSS and act on behalf of the Secretary of State; they have no independent status. Supervision of the clerical staff is carried out by an LOI responsible to the HEO. The post of supervisor<sup>'17'</sup> is again a Secretary of State role; it is sometimes a full-time post but more frequently combined with that of adjudication officer such that a single individual can find himself supervising a section and also taking adjudication decisions for it.<sup>'18'</sup> The contributions section comprises a number of inspectors, whose task is to ensure that the contribution requirements of legislation are satisfied by individuals (especially the self-employed) and by employers.

The organisation of the CB side can be illustrated using the following hypothetical example:

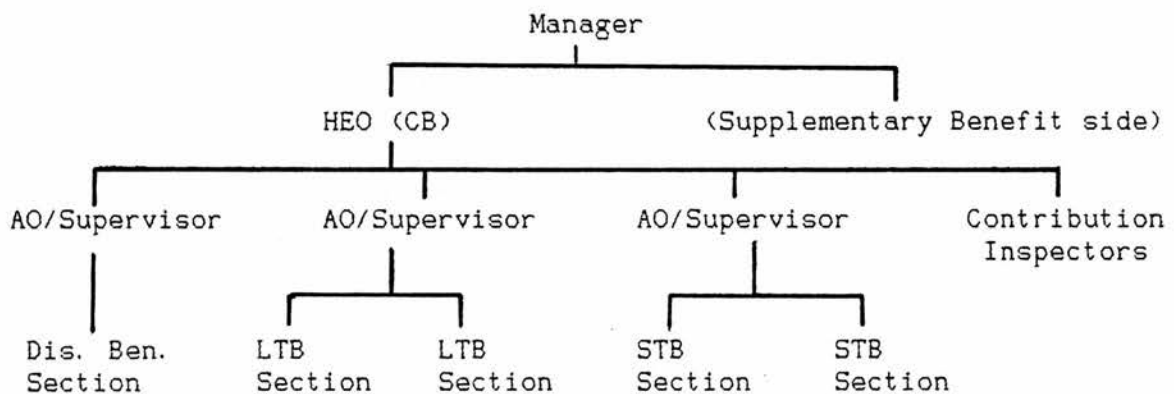


FIGURE 3.2 - The Organisation of the CB side of a local office

The HEO is primarily a manager responsible for the smooth and efficient running of the CB side, but he is also designated an adjudication officer (and known by the somewhat unwieldy abbreviation HEO/AO). In this latter role he has a number of duties to perform which are independent of his managerial function (carried out on behalf of the Secretary of State); he must carry out a number of 'adjudication checks' each week as part of the adjudication monitoring system to ensure that adjudication standards are satisfactory; he must supervise and coordinate the training of adjudication officers and be able to advise them on adjudication in general, or in relation to particular cases; and he must disseminate new guidance issued by the Chief Adjudication Officer. As an adjudication officer the HEO/AO can make adjudication decisions if necessary but he cannot instruct his staff to make particular decisions nor can he override any of their decisions. The manager of the office has no official adjudication function; he is not an adjudication officer but he does have a legitimate concern with the attainment of satisfactory levels of performance in all aspects of the office's activities, including adjudication.

## 2 - The Regional Office

The seven Regional Offices of the DHSS are primarily administrative bodies designed to ensure the efficient implementation of social security legislation and policy and the smooth running of the network of over 500 local offices.

Each Region is headed by a Controller and a Deputy. Beneath them are a number of Assistant Controllers, who have responsibilities for specific aspects of the organisation's work, and a number of Group Managers who will have overall responsibility for the management of a group of local offices. The exact differentiation of duties and arrangement of the management hierarchy will vary from Region to

Region but as an example the following is the organisation chart for one of the Regions visited.

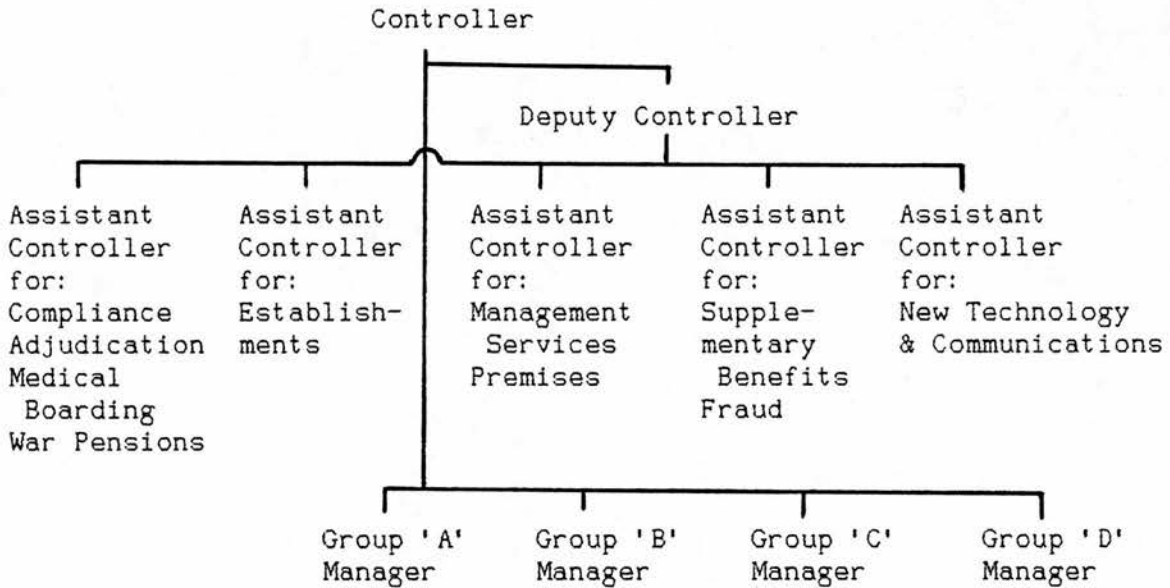


FIGURE 3.3 - The Organisation of a DHSS Regional Office

Prior to the establishment of OCAO in 1984 the Regional Office provided a source of advice and guidance to local offices through the Regional Principal Adjudication Officer (PAO) and his staff. However, in line with the recent trend towards strengthening the independent status of adjudication this task was transferred to the OCAO. Nevertheless, PAO Sections continue in existence as part of the adjudication monitoring system acting as agents of the CAO. They also act as channels of communication between OCAO and local offices.

Regional Medical Officers, responsible to the DHSS Chief Medical Officer, are also housed in Regional Offices. They and their staffs carry out a number of tasks connected with medical adjudication including the selection and training of AMPs, and of medical practitioners specifically retained to provide advisory medical



reports to assist in decision-making on benefits such as mobility allowance and attendance allowance. They also monitor the standards of decision-making of AMPs.

### 3 - The Central Offices

The major tasks of the Newcastle Central Office are the maintenance of all National Insurance contributions records, the payment of retirement pensions and widow's pensions, and the administration of child benefit. As such the office is only peripheral to this study.

The North Fylde Central Office (NFCO) deals with the administration of war pensions, attendance allowance, mobility allowance, invalid care allowance and family income supplement.<sup>(19)</sup> NFCO houses the Mobility Allowance Unit (MAU) which is responsible for the processing of all mobility allowance claims regardless of where the claimant lives. A Senior Medical Officer (and his staff of Medical Officers) at NFCO to give advice on medical aspects of mobility allowance to adjudication officers and to monitor the standards of the medical reports submitted by medical practitioners. Like Regional Medical Officers they are responsible to the Chief Medical Officer of the DHSS. The Mobility Allowance Unit is discussed fully in chapter 6.

### 4 - DHSS Headquarters

The London HQ of the DHSS is the apex of the organisation. It is divided into branches responsible for specific tasks required for the running of a large, bureaucratic operation, in addition to which are a number of policy branches which advise Ministers on social security policy and are responsible for drafting proposed legislative changes. Political control of the DHSS is held by the Secretary of State for Social Services; in relation to social security he is usually assisted by a Minister of State for Social Security and at least one Under-Secretary of State.

## Part II - SOCIAL SECURITY DECISION-MAKING AND ADMINISTRATIVE JUSTICE

### 1 - The Meaning of Adjudication

There is an inherent problem in an examination of social security decision-making caused by the term 'adjudication'. Whilst it has been adopted as an official (and legal) description of what the independent statutory authorities do in making decisions on claims and questions put to them, it is also used more generally to describe the process that the judiciary adopt in deciding between the competing claims of parties in litigation. The two views can be compatible (for example, when applied to tribunals level) but at the first tier of decision-making the absence of a dispute (and hence competing parties) has led some to suggest that 'adjudication' is an inappropriate term with which to describe the activities of adjudication officers. Citing Lord Diplock, <sup>(20)</sup> Ogus and Barendt write of the adjudication officer:

"His duties have been characterised as 'administrative' in that he is not adjudicating between the contentions of the claimant and those of the Department or any other party" (1982, p.586)

Mashaw, however, takes a wider view of the term; referring to the American social security system he writes:

" 'Adjudication' encompasses any determination of eligibility or amount of benefits at any stage of a social welfare claims process." (1974, p.774)

When one considers that social security officials, as much as judges, are making decisions in accordance with statute and case-law and that, although there may not be competing parties involved at the first tier, there will probably be competing decisions to choose between, then 'adjudication' in Mashaw's wider sense seems a justifiable extension of the term.

However, Mashaw's definition also implies that any person involved in eligibility determinations is 'adjudicating' and hence in the context of the British social security system this would include not only adjudication officers but also any individual making a decision (or, rather, a sub-decision) which contributes to the final, aggregate decision on a claim. Such a conclusion seems not unreasonable but there are also drawbacks in calling all decision-making on sub-decisions 'adjudication'. I will prefer to reserve the term to the process of decision-making where the decision criteria are statute and case law. Hence one can talk of Secretary of State adjudication in a comparable sense to adjudication by adjudication officers, SSATs, etc.

The decision-making process does not only comprise adjudication however, but all stages in the processing of a claim from its submission to the DHSS to the receipt of the final decision by the claimant. The adjudication officer's part in this is reflected in the following version of what adjudication entails (taken from a DHSS training manual issued to new adjudication officers):

"An adjudication officer should reach a decision by:-

1. Examining the evidence
2. Determining the facts
3. Applying the law

All evidence should be examined carefully and if necessary the Secretary of State should be asked to obtain further information. The evidence should then be weighed and the facts established to the adjudication officer's satisfaction on the balance of probability. The law is then applied to these facts and the decision given."

The place of adjudication in the total decision-making process can be illustrated by a diagrammatic representation overleaf (in the form of a flow-chart) of the process, where Secretary of State duties appear on the left of the page and adjudication officer duties on the right. Figure 3.4 could apply equally well, *mutatis mutandis*, to each sub-decision within a claims process as to the final aggregate decision.

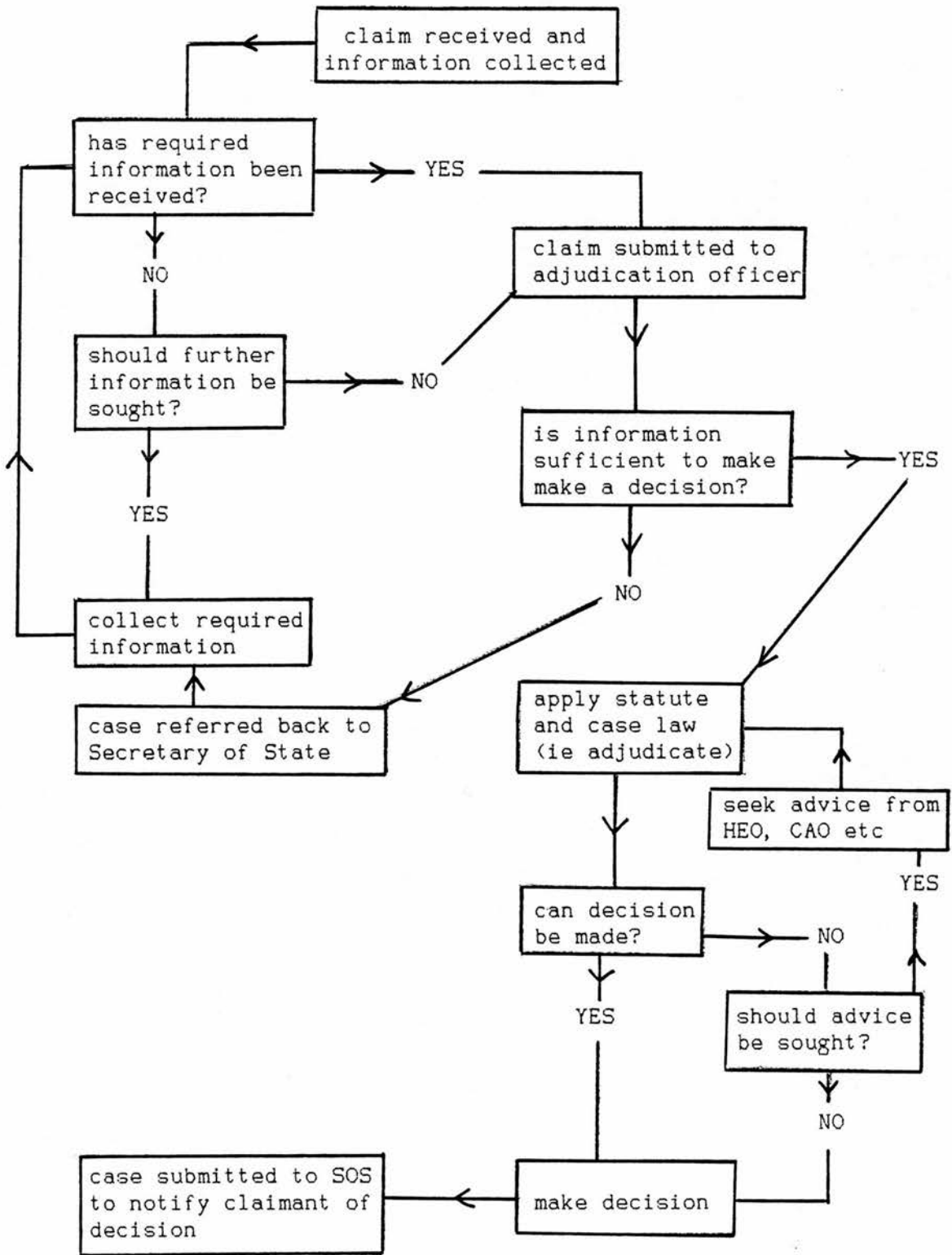


FIGURE 3.4 - A simplified representation of the social security decision-making process

The diagram has been deliberately simplified as much as possible to show the key elements in the process. In practice even such a routine operation as the collection of essential additional information (which may be necessary, for example, because a claim form is incomplete) involves a number of decisions on the part of the Secretary of State's representative (ie usually a clerical officer). For example, decisions may have to be made about the time and effort which should be committed to the collection of further evidence, what sources to will try, or whether to cross-check evidence that is suspected of being incorrect for some reason.

The total decision-making process, therefore, includes a number of separate operations of which adjudication is only one. In the chapter which consider the administration of industrial disablement benefit and mobility allowance, the examination of the decision-making process will consider all the elements so far identified and not restrict itself to the formal adjudication system.

## 2 - The Demands of Administrative Justice

This final section relates the demands of administrative justice, identified in chapter 2 in the context of welfare delivery services in general, specifically to the social security system. This will entail considering what these demands mean in practical terms for the lay and medical aspects of the administration of social security, and identifying those features of the system which are particularly concerned with them. This will serve as a more detailed introduction to an examination of the administration of industrial disablement benefit and mobility allowance and administrative justice.

### (a) Accuracy

Mashaw's definition (regarding US welfare claims) quoted earlier bears repetition; accuracy, he writes, is

"... the correspondence of the substantive outcome of an adjudication with the true facts of a claimant's situation and with an appropriate application of the relevant legal rules to those facts." (1974, p.774)

It is a careful definition which takes as its starting point the substantive outcome (ie a decision) and asks whether it corresponds with the 'true facts' of the case rather than starting with the facts and asking what decision must follow from them, an approach which would imply that there should be only one right answer which the decision-maker must strive to find. In contrast Mashaw's formulation does not rule out the possibility of more than one answer being 'accurate'.

This does not imply that every time a decision has to be made there is a variety of possible 'accurate' outcomes. When the decision criteria and evidence are both clear-cut then it is likely that there is only one decision which could be considered accurate. However, as chapters

5 and 6 will demonstrate, decision-makers are frequently faced with making decisions based on unclear decision criteria and evidence which do not necessarily allow of an unequivocal answer being reached. In such circumstances, social security case-law has established that,

"The onus of proof is on the claimant, and the standard is the balance of probabilities." (Ogus and Barendt, 1982, p.300; citing R(I) 12/62)

The Insurance Officer's Guide (IOG) explains how the 'balance of probabilities' is to be applied in practice.

"The test of balance of probabilities means that if the established facts give rise to conflicting inferences of equal degrees of probability, so that the choice between them is a mere matter of conjecture, then the claimant fails to discharge the onus of proof and his claim must fail; he is not entitled to 'the benefit of the doubt'." (IOG, Pt V, para. 5037)

Two aspects of the decision-making system are designed to promote accuracy: the training programme for adjudication officers and medical practitioners (acting either as AMPs or the providers of specialist medical reports), and the advice and guidance arrangements. The trainee adjudication officer spends thirteen weeks in the local (or central) office on a combination of teaching from a training officer, self-instruction using the specially-prepared training packages, and working with experienced staff. In this way knowledge of the appropriate benefits and the procedures relating to them are gained. After some months of carrying out adjudication officer duties the new incumbent will normally be sent on an Initial Adjudication Course held at one of the DHSS training centres throughout the country (or within a Central Office) where the principles and techniques of adjudication are reinforced and provisions common to a number of benefits (for example, how to deal with claims which are submitted late) are discussed. This initial course can be supplemented by later attendance at one of the specialist modules which deal with the complexities of one particular benefit. Advice and guidance, either



in the IOG or from OCAO, seek to ensure that adjudication officers comply with social security law when either the evidence available or the law itself creates problems for them. Training for AMPs has a similar aim: to equip the doctor with the requisite knowledge and skills to enable him or her to undertake medical adjudication, but follows a different pattern. Guidance documents are supplied to the tyro AMP who will then work with an experienced boarding doctor until judged proficient to act as a 'single-doctor board'.

Whilst the training and advice arrangements are designed to promote an accurate decision before it is made, two elements of the social security decision-making system which are particularly concerned with accuracy after a decision has been made, viz. the appeals hierarchy and the adjudication monitoring system. The appeals system is primarily concerned with providing a means of redress for the aggrieved claimant by re-hearing individual cases and substituting a fresh decision where it is considered that an incorrect decision has been made. But since an SSAT or MAT will normally only be considering cases that are brought before it by claimants it acts in a reactive rather than proactive manner. The contribution of tribunals to the promotion of accuracy at the first tier will, therefore, be indirect. For a lay adjudication officer, preparing and presenting an appeal consumes a large amount of staff time and having a decision overturned can reflect badly on an adjudication officer's original decision. The best way, therefore, to avoid both of these is to ensure that decisions are accurate in the first place.

On the other hand, the monitoring system operated by the OCAO is designed positively to promote accuracy as well as providing a retrospective examination of standards for the Secretary of State. However, once an OCAO or a Regional monitoring team has reported its assessment no further action is taken by them, ie if a team finds an error it will bring it to the attention of local management, which is responsible for the standard of work within the office, the team

itself has no power to revise that decision. The OCAO and Regional monitoring teams visit local offices and examine about 100 cases, some chosen randomly from amongst categories specified by the CAO and some chosen by local management as presenting particular difficulties. They assess accuracy by adopting a Mashaw type approach, ie it is recognised that for one set of evidence or facts there is not necessarily a unique correct answer. They will therefore not make a judgement that a decision is wrong but will identify what they see as a deficiency in the process of adjudication and, in their terms, 'raise an adjudication comment' on the point. The process which a monitoring team is required to follow is laid down in the first Annual Report of the CAO:

"In looking at a selected decision the officer should first consider whether all the evidence necessary to decide the question was before the adjudication officer. If it was not, this in itself justifies a comment.

If all the evidence needed was before the adjudication officer, the following questions should be considered in relation to the decision:

- (a) Was the decision, whether to award, disallow, disqualify or review, justified on the evidence?
- (b) Was the correct decision used, ie was the decision given on the correct grounds?
- (c) Did the decision relate to the correct period?
- (d) If the decision specified a rate or amount of benefit, whether awarded, offset or calculated as overpaid, was this figure correct?
- (e) Was there any other major factor which throws doubt on the correctness of the decision?

If the decision fails any of these tests a comment to the adjudication officer is required."

(DHSS, 1985e, Appendix 7, p.67)

Scrutiny of medical adjudication decisions is subject to no such elaborate arrangements. This is not to suggest that it is not treated seriously within the DHSS, a considerable proportion of the time of Medical Officers in Regional Offices is spent in carrying out post-board checks on the assessments of AMPs (and similarly Medical Officers in Mobility Allowance Unit check a proportion of medical

reports supplied for the purpose of making mobility allowance decisions). However, there is no equivalent overseer of medical adjudication comparable to the CAO, and certainly no annual report of the standards of decision-making made to Parliament.

As mentioned earlier, within each Central Office and local office the immediate superior of the adjudication officer, the HEO/AO, also carries out routine adjudication checks in order to maintain standards and identify where improvements in performance are required.

The social security decision-making system therefore contains several elements designed either to promote or to check accuracy. In the separate chapters on industrial disablement benefit and mobility allowance they will be discussed in greater detail and an assessment will be made of how accuracy is affected by each of them.

#### **(b) Fairness**

##### Promptness

Having one's claim dealt with promptly is an obviously desirable feature of the decision-making system and may be essential when social security is a person's only source of income. However, trying to define exactly what 'prompt' means is problematic. Mashaw's attempt to define a 'timely' decision is a useful start,

"That a decision is 'timely' simply means that it was made within a reasonable or a statutorily prescribed period of time after presentation of a claim." (1974, p.775)

However, if we look to primary legislation in this country we find that although a time limit for the processing of claims is prescribed, the wording of the statute limits its usefulness. Section 99(1) of the Social Security Act 1975 reads:

"An insurance officer to whom a claim or question is submitted ... shall take it into consideration and, so far

as practicable, dispose of it ... within 14 days of its submission to him."

There are several reasons why this is not particularly useful; firstly, it is concerned with only part of the decision-making process, ie formal adjudication; it ignores the time that a claim spends with the Secretary of State before it is 'presented' to the adjudication officer or AMP for a decision, and the time afterwards when it is passed back to the Secretary of State for promulgation and payment. Secondly, the phrase 'so far as practicable' is open to such wide interpretation that virtually any delay could be explained away by invoking it. As will be seen particularly with industrial disablement benefit and occasionally with mobility allowance, adjudication officers and AMPs are frequently forced to seek further information, which can add weeks if not months to the decision-making process making the 14 day target virtually meaningless. And thirdly, even 14 days can be an unacceptably long time in processing a benefit where it is the only source of income. In effect the 14 day target has fallen into disuse as the Department has adopted, where it is practicable, its own targets for performance in clearing cases which also incorporates the time spent in collecting information. (21)

Although it may seem that there are few incentives to timely decision-making there are powerful organisational and individual pressures (at least on the adjudication officer) operating to secure a steady if not necessarily a fast turnover of cases. Clearly, the organisation has an interest in reducing the time taken to reach decisions, since it may, as a result, be able to employ fewer staff. Furthermore, the provision of a quicker service could be expected to result in fewer complaints from the public (a powerful force on a politically-sensitive organisation such as the DHSS). Similarly, individual decision-makers will be keen to get through their work as quickly as possible to avoid a large backlog of outstanding cases; they too will be concerned to cut down the number of complaints and enquiries which

take up time and therefore hamper their adjudication or supervisory duties.

The danger of emphasising the speedy clearance of cases is that the other demands of administrative justice may suffer or be sacrificed. This is particularly so for the quality of decisions where there is often a trade-off between speed and accuracy, a trade-off which is ultimately left to the adjudication officer to make.

AMPs are not subject to such pressure; they will be routinely assigned a list of five or six cases per half-day session, at the end of which they will complete the relevant medical assessments. Their work, therefore, arrives in a controlled flow and is not subject to sudden influxes of claims, or to an accumulated backlog of cases.

### Impartiality

The essence of impartiality is the elimination of sentiments of bias or prejudice. Impartiality as a demand of administrative justice on the social security decision-making process means, therefore, that these sentiments are minimised if not squeezed out altogether. But to suggest how this might be done we need to ask what kinds of bias or prejudice are likely and what their sources are. Since the main actors in the decision-making process are adjudication officers and AMPs, and the DHSS, the two most important sources are the personal perceptions and value systems of decision-makers and the organisational interests of the Department.

The response to the possibility of undue Departmental influence has been to establish adjudication as independent of the DHSS. This means that in making decisions on claims the only responsibility of adjudication officers and AMPs is to comply with statute and case-law; they have no obligation or responsibility for their decisions to the



DHSS. For adjudication officers, however, their independence is bounded, since they are both civil servants employed within the DHSS (where they are likely to spend the whole of their careers) and are physically located within DHSS offices. Furthermore, in practice they may be required to undertake both independent adjudication duties, and duties on behalf of the Secretary of State. Such an arrangement therefore leads to the possibility of Departmental influences undermining the independent status of adjudication. In theory, AMPs should be immune from such potential influence since they are not salaried employees of the DHSS, but are engaged as independent contractors. In practice, however, their relationship with Regional Office Medical Officers opens a channel through which the concerns of the Department can be brought to bear upon them.

The response to the potential problem of individual bias from an adjudication officer against (or indeed in favour of) a claimant has been the advice from the CAO (in the IOG) that where possible the adjudication officer should refrain from personal contact with the claimant. The full text of the relevant paragraph reads,

"There is no legal bar to the interview of the claimant by the insurance officer, but this should be avoided wherever possible." (IOG, Pt I, para. 65)

A frequent explanation of the rationale behind the advice to maintain some distance between the adjudication officer and the claimant is that it would be unsatisfactory if a claimant appealed against a decision and then came upon the adjudication officer (in the capacity of presenting officer) before an SSAT. The presenting officer attends the tribunal not as the representative of the DHSS but as 'amicus curiae' to assist the tribunal by explaining the decision in question without adopting the position of defending it as correct. Hence, the argument runs, if the adjudication officer has interviewed the claimant previously then this neutral amicus curiae role is undermined. There are clearly advantages and disadvantages of

adjudication officers maintaining their distance from the claimant but the argument above is undermined by the fact that few adjudication officers actually present their own cases at appeal tribunals. Instead there tend to be specialist presenting officers in local offices, or one presenting officer to cover several offices on a rota basis; and for the Mobility Allowance Unit there is no question of adjudication officers travelling the country from Blackpool in order to present appeals (although they may attend tribunals in the immediate vicinity). This doctrine of keeping a distance from the claimant cannot, of course, be extended to AMPs who always, as a matter of obvious necessity, come into contact with the claimant.

Of course it is not necessary to have face to face contact with the claimant to allow bias or prejudice to influence decision-making. Deciding a case 'on the papers' alone is no guarantee of impartiality. Eliminating, or even identifying bias at this stage is difficult; nevertheless, the monitoring system is at least designed to ensure that the substantive outcome of a claim is reasonable.

One last comment remains to be made in relation to 'impartiality'. Independence as a response to the potentially undesirable intrusion of DHSS values seems reasonable, but it begs the question of why it should apply only to adjudication by adjudication officers and not adjudication by the Secretary of State. There seems no logical answer to this. One could perhaps suggest (as Ogus and Barendt do in the quotation cited earlier) that some issues may fall naturally to the Secretary of State to decide in preference to the statutory authorities but this does not seem to be supported by any hard evidence. Indeed it is a truism to say that Secretary of State decision-making cannot be independent of the DHSS, so the question of how the claimant can be effectively protected from bias in these circumstances remains hanging.



### Participation

Participation by the claimant at appeal is an integral feature of second tier decision-making; not only are aggrieved claimants allowed to present a case to an SSAT or MAT, but they are also encouraged to attend the hearing and participate in person or via a representative (or both). There is evidence that claimants are more likely to receive a favourable judgement if they actually attend, and even better if represented at the tribunal (Bradley, 1985, p.449), which implies that the opportunity for claimants to explain and expand upon the evidence promotes a decision based on more of the 'true facts' than with first tier adjudication, ie a more accurate decision. Such sentiments, however, do not appear to extend to the lower tier of lay decision-making. Here, information collection is carried out mainly by post using pro-forma letters of enquiry. Personal contact is only instigated by the Department when information proves difficult to collect or there is some uncertainty surrounding the information already collected.

So, participation in the lay decision-making process at the first tier is limited. Claimants may supply any information they wish, but this will be collected using the forms designed by the DHSS. Infrequently they may be asked to attend for interview, and claimants can always request an interview themselves. However, even then they are unlikely to see the adjudication officer who will make a decision on the claim (ie in accordance with IOG advice) but a member of the clerical staff.

On medical questions claimants always come face-to-face with an AMP or EMP, thus providing an opportunity for their greater participation in information collection. How much use is made of this opportunity by medical practitioners to involve claimants will be explored in chapters 5 and 6.

### Accountability

It was argued in chapter 2 that accountability, in the sense of the giving of comprehensible explanations should apply equally to both elements of the decision-making process, the collection of information and the application of the decision criteria. At present, however, the claimant will receive in most cases only a formal notification of the substance of the adjudication officer's or AMP's decision which will quote the relevant legislation. However, quoting that the requirements of subsection this or section that of such and such an Act have not been satisfied does not explain to the claimant why the adjudication officer or AMP reached a particular decision. Furthermore, the procedures operating at present do not place any obligation on adjudication officers or AMPs to explain why certain information is required and what use will be made of it.

On lay questions contact with the claimant is restricted to the collection of information and the notification of the final decision, functions which fall entirely to the Secretary of State, and not to the adjudication officer, to perform. The CAO, therefore, has no responsibility for carrying out any scrutiny of these parts of the decision-making process. And whilst it is clear that the DHSS complies with its minimum responsibility of informing claimants of the decisions of adjudication officers, quoting the relevant legislation, any further explanation to them will stem largely from local practice or from the personal inclination of individual adjudication officers. Similarly, the amount of explanation afforded the claimant at a medical examination will depend upon the individual approach of the AMP or other medical practitioner carrying out an examination on behalf of the DHSS.

## Part V - SUMMARY

This chapter has prepared the ground for the empirically-based analysis of the administration of industrial disablement benefit and mobility allowance by describing, firstly, the formal adjudication system and its place within the total social security decision-making system, secondly the organisational environment within which decision-making operates, and thirdly by relating the general demands of administrative justice specifically to the social security system.

Initially one might be left with the impression that whilst the demands of accuracy and, to a lesser extent, impartiality and promptness are reasonably well-reflected in the formal decision-making arrangements, comparatively little heed is taken of the requirements of participation and accountability. Whether this is a true reflection will emerge from the empirical data presented in chapters 5 and 6, after the methodology adopted to collect the data has been discussed in the next chapter.

## CHAPTER 4 - METHODOLOGY

### Part I - INTRODUCTION

"... researchers need to ... approach substantive and theoretical problems with a range of methods that are appropriate for their problems."

(Burgess, 1984, p.143)

"... the conduct, analysis and reporting of qualitative research requires a blend of imagination, flexibility, receptivity, discipline and hard work that enables the researcher to process the information as objectively as possible while making his or her own contribution to the analysis and synthesis of data."

(Morton-Williams, 1985, p.42)

This study is essentially socio-legal in nature, falling within the characterisation of socio-legal studies suggested by Partington<sup>(1)</sup>:

"Socio-legal studies may ... be broadly characterised as being concerned with attempts at understanding the modes of creation of law, the operation of that law, and the impact of law upon society."

The relevance of this for a methodological discussion is that it emphasises that the socio-legal study should be seen as something different from both the more mainstream sociological enquiry and also the exposition of black-letter law traditional in legal texts. But although different, similarities remain. Certainly an understanding of the minutiae of social security law and its interpretation by the Courts and Commissioners is essential. But this alone will not explain how officials implement statute and case-law when faced with actual cases in the routine practice of their work; for this an appeal to the data collection techniques of qualitative sociology, such as participant observation, semi-structured interviewing etc, is more appropriate. The practice of using these techniques is well-documented in, inter alia, Bogdan and Taylor (1975), Schatzman and

Strauss (1973), Schuman and Presser (1981), Burgess (1982 and 1984) and Walker (1985), all of which have proved useful in the design of this research. But in comparison with the literature on how to collect qualitative data there is relatively little on how to analyse it. Two exceptions are analytic induction developed initially by Znaniecki (1934) and the 'grounded theory' method of Glaser and Strauss (1967). Whilst drawing on these sources, this chapter is concerned with identifying a methodology particularly suited to socio-legal enquiry. (This is not to imply that there is a single 'socio-legal method' waiting to be discovered, a very positivist notion.) As the discipline of socio-legal studies matures further, it may emerge that a distinctive socio-legal methodology may emerge but at this stage what is needed of the researcher, as Morton-Williams (1985) suggests above, is "imagination and flexibility" to find the most 'appropriate' selection of methods from whatever the source.

The use of methods rather than a single method is now well-established as one of the ground rules of qualitative research, designed to combat the problems of potential bias that can originate from relying on only one method or data source. The term 'triangulation' (borrowed from psychology) is frequently used to describe this approach. The term need not, however, be restricted to method but, as Denzin (1970) suggests, be applied equally to data (for example, across time or place), the investigator (ie employing more than one researcher), or theory (ie using more than one theory to approach the data).

The idea of 'triangulation' whether under that name or one of its variants such as 'combined operations' (Stacey, 1969), 'mixed strategies' (Douglas, 1976), or 'multiple strategies' (Burgess, 1984) is very persuasive. The results of any subsequent analysis will surely be the more robust for the data being collected from a number of sources or having a number of minds or theoretical approaches applied to it.

The quotation from Burgess at the head of this chapter notes that the researcher will be faced with both theoretical and substantive problems. This raises the question of whether different methods are required as a response to each or whether the methods that are adopted will be expected to address both. For Glaser and Strauss (1967) theory emerges from (or is 'grounded' in) empirical research but, among the critics of grounded theory Rose (quoted in Burgess, 1984, p.181) questions "whether theory construction is intimately linked to field research". There can be no absolute answer; theory can be developed away from empirical enquiry or be inextricably linked with it. Or be somewhere in between. Mashaw's description of his development of the concept of administrative justice as "in part empirical and in part intuitive and analytic" (1983, p.17) perhaps gives the best hint on the way to proceed.

As the introductory chapter explained, there was an initial desire to answer a simple, but, in view of the number of individuals dependent upon social security payments, important question: "how is an initial decision on a social security claim made by the DHSS?", a question previously only partially addressed in the literature. Linked with this substantive enquiry was the question prompted by a reading of Mashaw's 'Bureaucratic Justice' (1983) of whether the concept of administrative justice, either in his formulation or some version of it, had any relevance in the analysis of the first, empirical question.

The strength of using the concept of administrative justice in such an analysis is that it not only assists an explanation of how decisions are made, but also provides a normative framework for evaluating an existing organisation's practices and performance, and for suggesting how these might be improved, ie it addresses the question of how decisions ought to be made.

So conceived, this project resolved itself into two separate (but linked) phases; if the concept of administrative justice was to be used as a tool with which to explore the social security decision-making system, then it firstly had to be defined (and, if necessary, refined). How this was done and with what results comprise the substance of the previous chapter. The subject of the current chapter, in contrast, deals with how these theoretical deliberations were translated into a methodology for the empirical stage of the project, examining the operation of social security law in practice.

This second phase, regardless of the flexibility or imagination of the researcher, was inevitably subjected to the eternal constraining factors of time, money and access. Some of these were known initially whilst others emerged later. Also, whilst some were relatively fixed, others changed, or at least were susceptible to change. The choice of methodology adopted, therefore, must be understood not only as an appropriate 'technical' response to the research issues, but also in the context of the constraints on the project.

While the theoretical and substantive concerns of the project were relatively clear, but still very wide, at the outset, decisions were needed on the nature and extent of the related fieldwork. 'Decision-making in social security' had to be restricted to something manageable within the initial resource constraints noted above. The practical concerns of the Department limited the extent of the fieldwork to a study of the administration of industrial disablement benefit and mobility allowance.



## Part II - THE STRATEGY FOR DATA COLLECTION

The use of 'multiple strategies' has been particularly evident in the relatively few studies into the operation of administrative law. A few of the more relevant of these reveal a range of methodologies each adapted to suit the particular objectives (and resources) of the study in question.

In Coleman's novel and successful study (1970) of the internal review of supplementary benefit decisions, supplementary benefit officers completed standardised questionnaires about the outcomes (and the reasons for them) of all appealed decisions in the country for a period of twelve months, and yielded data suitable for quantitative analysis.

More recently, the ambitious integrated series of studies by the Policy Studies Institute (Berthoud, 1984) into the effects of the 1980 supplementary benefit reforms adopted a wide range of survey, observation, and interview techniques in order to explore families' needs and budgeting strategies, claimants' knowledge of the social security system, the conduct of DHSS staff, and the relationship between the state, its agents and the claimants.

Howe's study (1985) of the enduring 'deserving/undeserving' distinction adopted by supplementary benefit officers in a local DHSS office in Northern Ireland used (i) observation techniques for recording staff/claimant encounters and the activities of staff at work, (ii) 'talks' with staff, (iii) interviews with claimants, and (iv) scrutiny of Departmental documents. From the data derived from these methods Howe draws plausible conclusions about the 'deserving/undeserving' issue.

Multiple strategies have also been used in recent studies of the activities of regulatory, rather than welfare, agencies. Richardson et al (1982) and Hawkins (1984), in two studies of water authorities and the control of pollution, both combine participant observation with informal interviews and documentary analysis. Such techniques were considered to be the most appropriate for the collection of data from agency staff who spent much of their time on field visits and in direct contact with the 'dischargers' of pollution.

Studies of administrative action are more common in the USA and here also we find a range of methodological approaches employed. In the classic early study of Blau (1963) into the dynamics of bureaucracy, documentary analysis, interviews and sophisticated observation techniques were combined to provide a powerful analysis of the functions and dysfunctions of the interaction between the structural features of an organisation and the informal networks that develop within it.

Nonet's (1969) seminal study of institutional change (how the Industrial Accidents Commission (IAC) of California adapted itself to the changing demands placed upon it, and its changing relationship with the claimant) makes extensive use of archival material supplemented where possible with interviews of older employees, to explore the IAC's early development; observation of administrative proceedings; and interviews with the relevant actors in the process (IAC members and officials, lawyers, union officials etc) for more contemporary data.

Kagan (1978), in his study of the price and wage freeze legislation of the Nixon administration, was able, as a practising lawyer in the Office of Economic Protection, to utilise fully the technique of participant observation which he supplemented with a quantitative analysis of the agency's records.

Bardach and Kagan's (1982) interest in the operation of state regulatory agencies was pursued using lengthy and open-ended interviews with inspectors from a wide range of agencies, accompanying them on field visits, relevant documentary analysis, and by holding a two-day workshop of all those involved.

The American studies cited above display a great awareness of the importance of explaining the methods used in constructing a piece of social research. (The British studies by Berthoud (1984), Richardson et al (1982), and Hawkins (1984) are similarly mindful of the need to discuss their methodologies.) The unfortunate exception to this healthy trend is Mashaw's 'Bureaucratic Justice' which provides nothing comparable. However, mention is made of "interviewing and observation" at the Social Security Administration (SSA) and the state disability determination services over a period of thirty days "pestering". Clearly, also, Mashaw has made extensive use of governmental statistical and other reports, and SSA internal documentation.

Studies of the operation of tribunals have also adopted a varied methodology. Adler, Burns and Johnson (1976) in their comparison of Supplementary Benefit Appeal Tribunals and National Insurance Local Tribunals (ie before they were incorporated in the single Social Security Appeal Tribunal system) combined documentary analysis of tribunal casepapers with what might be called 'structured observation', ie the use of a series of questions to be answered by observers rather than a tabula rasa approach of recording everything and anything to be sifted later. Significantly, the observer questionnaire was constructed using the Franks Committee criteria of 'openness, fairness and impartiality' as guiding principles<sup>(2)</sup>.

Lister's (1974) study of the adequacy of the supplementary benefit appeals apparatus in the London area similarly drew on Franks to provide evaluative criteria. Postal questionnaires to tribunal

chairmen and members, observation at hearings, and the experiences of Child Poverty Action Group and Citizens Rights Office members provided the raw data for analysis.

In a comparable study of social security hearings in the USA by Mashaw et al (1978), resources clearly allowed a more ambitious and extensive trawl of sources. Mashaw reports,

"... an exhaustive review of the literature, ... an intensive investigation of four ... hearing offices (including review of documents, observations of hearings and lengthy interviews with Administrative Law Judges, staff personnel, claimants, claimants' representatives, and expert witnesses), and a statistical analysis of a random sample of disability hearing records..." (p.xix)

This brief review of the methods adopted in a variety of studies of administrative behaviour presents a range of responses to the problem of how to conduct the collection of data. Studies such as Mashaw et al, and Bardach and Kagan perhaps present one end of a continuum of possible approaches, ie an appeal to virtually every technique currently available to the social scientist. Stretching behind this extreme comes the bulk of more limited studies displaying varying degrees of scope and sophistication. This is not to imply that the all-encompassing methodologies of Bardach and Kagan (and like studies) produce results superior to the rest; each must be judged against its own theoretical and substantive concerns, the only proper test being whether the methods are appropriate and sufficient to tackle the aims of the research. For example, Mashaw in 'Bureaucratic Justice' clearly accomplishes his task of generating theory and using it to suggest possible reforms in disability benefit administration with seemingly a much less ambitious data collection programme than his earlier study of appeal tribunals.

These studies provide useful (and mostly reassuring) insights into the design of a methodology for this project. The brief review presented above might suggest that the technique of participant observation is

well-suited to studies of administrative activity. However, one of the constraints agreed with the DHSS was to forgo the use of observation techniques. In retrospect, though, this proved far less of a hindrance than might have been expected. Part of the reason for this lies in the nature of decision-making itself. Kagan, in his earlier study puts the point admirably:

"The process of a legal decision in an administrative agency is not easily susceptible to pure observation. It takes place at desks, in offices, in occasional conferences and telephone conversations, and in hurried conversations in corridors. The participants spend a great deal of time studying documents. To a very great extent, the process takes place in people's heads." (1978, p.185)

A projected study along the lines of Blau's investigation of the internal functioning of an organisation would have been severely hampered by a veto on observing officials at work, but as the main focus of the research was now firmly established as decision-making, techniques were needed more to elicit what went on 'inside people's heads'. Clearly, interviewing would be the principal source of information, but the opportunity also existed to examine internal local office documents and claimant casepapers. However, an introductory month spent in an Edinburgh local office had indicated that a visual examination of casepapers would not be sufficient in many cases (particularly disallowances) to provide an explanation of why an individual decision had been made. Also it was clear that the complexity of social security legislation would prove a hindrance in appreciating fully the particular treatment of a case. The decision was taken, therefore, to use casepapers as the basis of a discussion with adjudication officers to explore further pertinent issues raised in the interviews.

The range of internal documents for which access was granted included both published and unpublished DHSS material. Published sources included the social security statutes and secondary legislation, Commissioners' decisions and reports from the Chief Adjudication

Officer. In addition permission was given to study the procedural codes (ie internal DHSS operating manuals), the advisory Insurance Officer's Guide and its amendments, monitoring reports for individual offices, statistical returns and the occasional internal study report.

This section has attempted to explain how the broad data collection strategy came to comprise the three 'multiple strategies' of interviewing DHSS staff, conducting a casepaper study, and analysing internal DHSS documents. From here the design of the methodology turned from broad strategy to questions of detail.

### Part III - FROM BROAD STRATEGY TO DETAIL: ASKING THE RIGHT PEOPLE THE RIGHT QUESTIONS

Having arrived at a strategy for data collection, more detailed questions arose; specifically who to interview, how many, and from where in the UK, and similarly, how many casepapers to examine and what information to extract.

#### 1 - The Interview Sample

##### (a) Who to interview

Adopting Glaser and Strauss's criterion of 'theoretical purpose and relevance' (1967, p.45) for deciding which groups of lay and medical officials to interview it was decided to include representatives of all those within the DHSS who had an important bearing, direct or indirect, on the production of an initial decision on a claim. The list on the lay side was formidable:

- (1) the relevant adjudication officers
- (2) local office disablement benefit clerks (as collectors of information)
- (3) the relevant office HEO/AOs (in the roles of manager, monitor, trainer, and advice-giver)
- (4) local office managers (given his scope for influencing the internal organisation and structure of adjudication)
- (5) Regional monitoring teams
- (6) DHSS training staff
- (7) OCAO staff (as both advice-givers and monitors)
- (8) DHSS Medical Officers (as advice-givers on medical issues)



On the medical side the cast of characters was more limited:

- (1) Adjudicating Medical Practitioners (AMPs) (for disablement benefit decision-making)
- (2) Examining Medical Practitioners (EMPs) (as providers of medical reports on mobility allowance)
- (3) DHSS medical officers (as managers, advice-givers and monitors)

Certain omissions from these lists should be explained. Firstly, the claimant; this is a conscious omission since the whole motivation for this study was to pursue research within the organisation, and hence it was felt important to devote what resources were available to this end. Secondly, it is clear that the higher echelons of management in the Regional Offices and at HQ, plus the political masters of the whole enterprise do have an influence on initial decision-making via the production of primary and secondary legislation, and in the broad policy decisions taken on the administration of the Department. Their omission is based on their remoteness from the 'front line' (and because their decisions and actions will be mediated through the office manager, who was included in the sample). More mundanely, the limitation of the time available for field visits was also relevant; it was seen as important to interview as many as the primary actors identified in the lists above, such that the sacrifice of the more remote actors was considered justifiable. Thirdly, members of SSATs and MATs, and the Social Security Commissioners were omitted from the sample. The reason for this decision again rested partly on resource considerations, but was also because their influence on initial decision-making was indirect, ie as a by-product of their decisions. How tribunal members or the Commissioners reached their decisions and how they approached adjudication was, therefore, not directly relevant to the activities of adjudication officers, disablement benefit clerks, AMPs, EMPs etc.

(b) How many, and where

A frequent criticism of research which relies in part or totally on qualitative methods is that the results obtained will be unrepresentative of the total population from which the sample was drawn. Whilst such criticism cannot be ignored it is often based on a mistaken idea of the nature of qualitative work. Much qualitative research is not concerned with hypothesis testing but with ethnographic description or with theory generation. Only if the researcher is intending to draw general conclusions about a defined population should he or she be concerned with rigorous sampling techniques. To take a germane example, OCAO sample 42 of the 500 or so local offices in England, Scotland and Wales every year since this figure gives the DHSS the necessary confidence that the results obtained are indeed representative of all local offices. However, as Morton-Williams argues,

"... the rigorous sampling procedures used in quantitative research are inappropriate to the nature and scale of qualitative work." (1985, p.30)

Also, whilst quantitative methods may indicate the likelihood of phenomena being related in some way (for example, by  $\chi^2$  tests, t-tests, rank correlation tests etc.) they are not useful for identifying the causes of such relationships (this criticism, of course, lies at the heart of the critique of positivist sociology, ie that social phenomena can only be explained adequately in terms of the meaning that they hold for the actors involved). Choosing a sample for qualitative research therefore does not concern itself primarily with the achievement of representativeness in a statistical sense but rather with what Morton-Williams call purposiveness, '3' ie,

"... rather than taking a random cross section of the population to be studied, small numbers of people with specific characteristics, behaviour or experience are selected to facilitate broad comparisons between certain groups that the researcher thinks likely to be important." (1985, p.30)

Given the nature of this project, therefore, it was considered inappropriate to seek a statistically representative sample but, in order to have some confidence in the results, a wide variety of respondents should be drawn from as many different locations as possible. The final sample was negotiated with the relevant lay and medical officials at HQ and the Regional Offices.

**(c) The local office sample**

For administrative purposes the UK is divided into seven Regions by the DHSS. Agreement was reached with HQ to visit five local offices in each of four Regions: Scotland, London South, the North East, and Wales and the South West. Scotland was chosen so that travelling costs could be minimised, and London South because disablement benefit was centralised in three outstations (a unique arrangement). The remaining two were suggested by HQ but were entirely suitable since they contained the types of industrial area which could be expected to produce a wide range of disablement benefit claims. Negotiation then moved to the Regional level, where it had been agreed with HQ, the final decision on which offices should be visited would be taken; local offices are frequently involved in internal Departmental checks, visits and studies which are inevitably disruptive of some degree to the normal running of the office, and hence each Regional Office was concerned to spread the load of these interruptions and not overburden a single office. This limitation proved no obstacle in practice. In response to the request that the five offices chosen should include offices of varying sizes, representing a range of industrial demography, Regional Offices were always co-operative. (For the London South Region the choice of the three outstations was automatic.)

Towards the end of the third Regional visit it was decided (with the endorsement of both academic supervisors and the Research Branch of

the DHSS) that the fieldwork up to then had furnished as much empirical data as (i) was needed to pursue a satisfactory empirical analysis, and (ii) there would be time to analyse. The stage of 'theoretical saturation'<sup>4</sup> had been reached. It was thought that the month or so that it would have required to collect another 35 interviews from the fourth Region (to add to the 130+ already collected) could be better spent in analysing the large amount of data accumulated. Accordingly the Wales and the South West Region was dropped from the study.

Table 4.1 gives a list of the offices visited, their internal organisation (ie the total number of staff employed and the number engaged on contributory benefit (CB) duties), and a brief summary of their industrial demography.

**TABLE 4.1 - The Local Offices in the Study**

Local Office (Region in brackets)*	No. of Staff (CB in brackets)	Industrial profile
Cowdenbeath (S)	72 (16)	Formerly coal mining; only workshops remain. High unemployment (30%)
Dundee East (S)	193 (65)	Mainly inner city residential. Residual jute industry; formerly shipbuilding. Growth of light industry (electronics).
Edinburgh North (S)	132 (30)	Formerly shipbuilding and dock-yards, now mainly residential.
Glasgow City (S)	153 (50)	Business and commercial centre of city. A few small clothing firms. No industry.
Perth (S)	113 (38)	Mainly rural (2,500 sq. miles); agriculture, tourism. Little light industry; food processing.
Dewsbury (NE)	170 (58)	West Yorkshire conurbation. Chemical works only heavy industry. Former woollen industry.

Doncaster West (NE)	183 (61)	Rural areas to North and East. Heavy industry (coal, steel, railways).
Rotherham South (NE)	200 (66)	Coal and steel industries (though much reduced). Large centres of population surrounded by rural areas.
WallSEND (NE)	94 (26)	Major employers are Tyne shipyards. All other heavy industry has disappeared. Small trading estate of light industry. Otherwise residential.
York (NE)	194 (64)	Mixed urban/rural. Large employers: chocolate manufacturers, British Rail, Ministry of Defence and large modern coal mine at Selby.
Aldershot (LS)	77 (35)*	Mainly rural. Shipyards in Southampton; naval dockyards at Portsmouth. Wide-spread light industry. SW London.
Broadstairs (LS)	75 (32)*	Rural/small town mix. Kent coalfield; farming; little light industry. SE London
Hastings (LS)	196 (21)*	Rural/small town mix. Tourism; some light industry.

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\* S = Scotland; NE = North East; LS = London South

† London South Offices have only CB staff, the figure in brackets refers, therefore, to the disablement benefit staff.

‡ Hastings also acts as an integrated local office (ie housing supplementary benefit and pensions staff)

From the thirteen local offices visited, seventy staff were interviewed. Table 4.2 gives a breakdown of these.

TABLE 4.2 - Interview respondents from the Local Offices

Managers	13
HEOs	16
Adjudication officers	27
Dis. Ben. Clerks	14
<hr/>	
TOTAL	70

**(d) The Regional and Central Offices Sample**

The Regional offices in Edinburgh, Leeds and Sutton were visited. Staff interviewed were as follows:

**TABLE 4.3 - Interview respondents from the Regional Offices**

CB Branches	10
Medical Branches	6
<hr/>	
TOTAL	16

In the Mobility Allowance Unit at NFCO a total of 21 staff were interviewed from all sections dealing with the full range of administrative duties. Also interviewed were the Controller and Deputy Controller of NFCO who are managerially responsible for the 5000+ staff who administer mobility allowance, attendance allowance, family income supplement, war pensions etc. Table 4.4 gives a breakdown of these (the function of each section is described in chapter 6).

**TABLE 4.4 - Interview respondents from the Mobility Allowance Unit**

Administration	3
Claims and Payments	3
Appeals	3
Lay Scrutiny	3
Reviews	3
Homes and Motability	2
PAO Section	1
Medical Branch, M7	1
Controller/Deputy Controller	2
<hr/>	
TOTAL	21

At the Nottingham Training Centre a different approach was adopted. As well as interviews with the Head of the training section and two of the training officers it was possible to sit in on one of the Initial

Adjudication Courses (for new adjudication officers) for a week, observing and talking to the participants.

The visit to the OCAO comprised interviews with the Chief Adjudication Officer and eight of his staff engaged in advice and monitoring functions for both mobility allowance and industrial disablement benefit. The Principal Medical Officer responsible for medical advice on the Industrial Injuries scheme (including compilation of the Industrial Injuries Handbook for AMPs) was also interviewed.

#### **(e) The Medical Sample**

Medical Practitioners acting as AMPs (for disablement benefit) or EMPs (for Mobility Allowance) are employed as independent contractors by the DHSS on a sessional basis; in contrast to their medical colleagues in the Regional and Central offices, they are not DHSS civil servants. Their co-operation with this study, therefore, was on an individual, voluntary basis. The Senior Medical Officers (SMOs) in the Regional Offices assisted in choosing and approaching suitable medical practitioners to interview. It was decided to interview five doctors in each Region (admittedly a somewhat arbitrary figure but based on considerations of time and financial resources). Letters were sent to the selected doctors explaining the aims of the study and seeking their co-operation. All sixteen who were approached agreed to be interviewed (the London South SMO sent six names, rather than the five requested). The five from Scotland came from Edinburgh and Glasgow, the North Eastern five from Leeds, and the London South contingent from Reading and Balham.



(f) The Sample - A Summary

Table 4.5 gives a summary of the officials interviewed in the course of this study. They are divided between lay and medical staff and according to their relation to the task of adjudicating on claims.

TABLE 4.5 - The Complete Sample

	Lay	Medical	TOTAL
Purely managerial staff	18		18
Staff directly involved in the adjudication of claims	38	16	54
Staff with combined managerial and indirect adjudicatory functions <sup>(a)</sup>	16	4	20
Staff indirectly involved with the adjudication of claims <sup>(b)</sup>	26	4	30
Clerical staff	14		14
TOTALS	112	24	136

(a) includes HEO/AOs and Regional Office medical staff

(b) includes staff engaged on advisory and monitoring duties

## 2 - Details of Data Collection

### (a) Interviews

In constructing the interview schedules for the various groups of staff identified as relevant for this study two related principles were adhered to throughout. Firstly, that the questions should address the issues raised by the discussion of administrative justice, and in particular, should provide qualitative data on how the demands of administrative justice (accuracy and fairness) were affected by (i) the structuring of the DHSS organisation, and (ii) the personal influences of the individual actors in the decision process. And secondly, that this exploration of the operation of the law in practice, should be pursued by collecting the respondents' own accounts of their roles in the determination of a claim for benefit. With these two principles in mind a semi-structured interview technique seemed the most appropriate, ie using a schedule which asked specific, yet open-ended questions allowing the respondent the time and freedom to develop his or her own answers, and the interviewer the opportunity to pursue interesting strands or clarify vague or contradictory responses. A series of draft schedules was constructed and piloted in three local offices in Scotland in January 1986 prior to the start of the main part of the fieldwork in the February.

The schedules were constructed around a core number of questions which were of necessity specifically tailored to reflect the respondent's role in the decision-making process (hence, for example, the schedule for disablement benefit clerks bears little resemblance to that used for the Chief Adjudication Officer or for AMPs). A full set of schedules is attached as an appendix but a brief summary of them may be useful. Common to all interviews were the sections on biographical details, ie age, sex, years of service in DHSS, in present post, career history; and the final question giving the respondent carte blanche to add any comments on any aspect of their work.

Where appropriate questions were asked on the following topics:

- (i) the central functions and tasks of the respondent's post
- (ii) the nature of adjudication
- (iii) the use and effectiveness of advice channels
- (iv) the use and effectiveness of the monitoring arrangements
- (v) the influence of the appeals system
- (vi) the experience and effectiveness of training
- (vii) the involvement of the claimant in decision-making
- (viii) accountability to the claimant
- (ix) specific problems arising from industrial disablement benefit/mobility allowance decision-making
- (x) the notion and practice of centralised decision-making

Staff in managerial posts were questioned about the staffing arrangements of their part of the organisation and local office managers provided background information on the geographical and industrial areas served by their offices.

#### **(b) Casepapers**

As explained earlier the purpose behind an examination of casepapers was to explore further issues raised in interviews and to be able to cite later some actual examples of how decision-making was carried out. With this in mind cases were not chosen randomly, instead the adjudication officer was asked to select recent cases (so that recall of the case would be fresh), one from each of the following categories, which would provide illustrations of how they approached the making of a decision on a claim:

- a straightforward industrial accident case
- a straightforward prescribed disease case
- a problematic industrial accident case
- a problematic prescribed disease case
- a special hardship allowance case
- an appealed case

These categories were not, of course, mutually exclusive. Quite often an accident case involved a later claim for special hardship allowance (possibly followed by an appeal). In some offices it was not possible in the time to examine cases from all six categories (particularly

where there was a large number of adjudication officers to interview), whilst in some of the smaller offices enthusiastic adjudication officers produced, and discussed, up to eleven cases. In total 71 cases were examined allowing discussion on decision-making on 38 industrial accidents (27 straightforward/11 problematic), 27 prescribed diseases (11/16), 30 SHA cases (6/24), and 18 appealed cases.

From these cases the following information was extracted (either from the papers themselves or the adjudication officer, but usually both):

- the factual details of the case (the 'story');
- the nature of the evidence involved, problems arising, and the adjudication officer's response;
- how the evidence was considered in relation to the relevant parts of the legislation, problems arising, and adjudication officer's response;
- the use of advice (from the IOG, HEO, OCAO, or elsewhere);
- the time taken to deal with the case;
- the level of explanation given to the claimant.

The object of examining casepapers was modest - to elicit illustrative examples of decision-making in practice - but was nonetheless extremely useful. Several cases will be quoted in the following two chapters.

### **3 - Postscript: A note on the conduct of field visits**

Following the selection of the Regions to be included in the study, DHSS HQ wrote to Regional Controllers enclosing a brief outline to the project. This was in turn sent to the Managers of the selected local offices in each Region. I subsequently wrote to each Manager explaining in more detail what I would require from the local office staff during my visit, and offering to meet (either on arrival or before if necessary) any staff representatives or trade union officials. In the event this offer was only taken up in one of the thirteen offices visited (although in one other office two trade union

representatives attended the initial meeting with the staff (see below)).

In early discussions with HQ it was agreed that, since the relevant personnel in each office would normally only total four (Manager, HEO, adjudication officer, disablement benefit clerk), two days should be sufficient to gather the material required from interviews and casepapers. The plan of the two days followed a familiar pattern. On arrival, after an initial meeting with the Manager, I held (at my request) a meeting of all those staff involved, however remotely, in the determination of disablement benefit claims. In a few of the smaller offices this was a small gathering (ie the minimum four identified earlier) whilst in the larger offices and in the benefit offices of the London South Region double figures were more the norm. At this meeting I took the opportunity of explaining who I was, where I came from, how the project originated, its aims, the programme of field visits, and the nature of the final product. I then opened myself to questions on any aspect of the work. After one or two such meetings it became clear that my status vis-à-vis the DHSS was an important issue. This arose partly from a natural distrust on the part of many staff of any project carried out with the sanction of HQ which they construed as yet another attempt to reduce the size of the Civil Service. But also there was a current policy idea circulating around the Department concerning the possible establishment of 'Regional Disablement Centres' (RDCs) designed to assume the decision-making responsibilities for all benefits for the disabled (including therefore industrial disablement benefit). Hence it was assumed (not unnaturally perhaps) that I was in some way linked to this and had been commissioned by the Department. My explanation that I was completely independent of the Department and in no way connected with the RDC initiative seemed to be accepted, but I took pains thereafter to explain my position fully and clearly in the introductory meeting in each local office in order to pre-empt any anxiety or suspicion, and to emphasise the confidentiality with which all their answers

would be treated. The final part of the meeting was spent arranging a timetable for the interviews and briefing the adjudication officer on the casepaper study which was always held at the end of the two days in order to allow the adjudication officer sufficient time to select suitable cases.

For the most part interviews were conducted using a tape recorder for later transcription or, if the respondent requested, notes were taken instead and written up soon afterwards. Interviews typically lasted for one hour.

In essence the visits to Regional Offices, Medical Boarding Centres, NFCO, OCAO, and the Nottingham Training Centre followed the same basic pattern of initial meeting (where appropriate) followed by individual interviews.

#### Part IV - ANALYSIS: MAKING SENSE OF THE DATA

"In many ways this is the truly creative part of the work - it entails brooding and reflecting upon mounds of data for long periods of time until it 'makes sense' and 'feels right', and key ideas and themes flow from it. It also is the hardest process to describe..."

(Plummer, 1983, p.99)

Preparing the data for analysis was relatively straightforward. The interview tapes and notes were transcribed onto a microcomputer disc followed by a standard 'scissors and paste' endeavour (much facilitated by the the data handling powers of the computer). In this way all the responses to a single question were collected together relatively simply.

From the accumulated data certain factual information about the organisational arrangements for decision-making could be extracted giving a picture of the response of the DHSS as a state agency to its legal duty to administer social security benefits. Such background material was essential for placing the activities and behaviour of the individuals involved in the decision-making process in an institutional and organisational context.

The analysis of how decisions are made was approached by posing a series of questions prompted by the analysis of administrative justice and of the decision-making process, discussed in chapter 2. For example, what does accuracy mean in the context of a mobility allowance decision? what are the relative weights of the two phases of decision-making process (evidence collection and application of the decision criteria)? which actors in the process have the greatest influence on the final outcome of a claim? etc. In the attempt to provide answers to these questions all three main sources of data (interviews, casepapers and documents) were used.



The data were primarily qualitative, the use of open-ended questions sacrificing the opportunity to perform statistical analyses of interviewee responses. This, as Hedges argues, should not be considered a weakness of qualitative research:

"Analysis of qualitative data is essentially non-numerical. There may be occasions where the researcher should actually tot up the numbers of people who said different things for his own illumination, but it will rarely be proper to quote such numbers in the report, and certainly not in such a way as to make them seem like mathematically reliable statistics." (1985, p.88)

Morton-Williams also argues that any criticism that qualitative research is devalued by the lack of numerical analysis, is misplaced, and puts the case strongly for the use of interviewees' own words in any analysis.

"The researcher will be mainly concerned to identify and describe the range of behaviour and opinions rather than to indicate whether people feel strongly or how many hold each view. In all cases the description of beliefs, attitudes and motivations should be supported by evidence in the form of verbatim quotations from the interviews or discussions." (1985, p.41)

The presentation of the results of the empirical study of industrial disablement benefit and mobility allowance in chapters 5 and 6 makes extensive use of verbatim quotations. As Hedges points out,

"... (quotations) often convey the tone and quality of people's thoughts better than the researcher's own descriptions." (1985, p.90)

However, this technique was not chosen merely to enliven the text; the quotations are valuable in "defining, supporting, or elaborating the researcher's interpretation of events" (Walker 1985, p.193). They also serve, as Morton-Williams argues, the useful function of,

"... an essential corrective to false impressions that may be formed during the reading of the transcripts." (1985, p.41)

In selecting the quotations to be used in the text, I have tried to avoid the over-exposure of the articulate or garrulous members of the interview sample, but have drawn widely from the 136 transcripts. In order to maintain the anonymity of the individual respondents, quotations are only identified by the appropriate job title and a number signifying either the appropriate local office (#1 - #13) or Region (#1 - #3).

Whilst numerical analysis of qualitative research interview data is mostly inappropriate this does not imply that it should be completely eschewed. In the spirit of 'triangulation' or 'mixed strategies', numerical data were gathered from either published sources or internal documents where it was thought that this would enhance the overall analysis. The numerical data presented in the following chapters is mainly descriptive; where statistical testing has been possible and seen as appropriate this has been carried out using the data handling capabilities of the AMSTAT 2 computer software package.

## Part V - CONCLUSION

This chapter has described and accounted for the particular blend of data collection and analysis techniques adopted for a study which has been deliberately socio-legal in nature. In addition to the inevitable constraints of time and money the project has had to confront and respond to a series of limitations imposed on access to DHSS staff and documents. Whilst these have been frustrating and time-consuming they have not meant that the overall aims of the research (ie to answer the question of how decisions on social security claims are made, and to develop the concept of administrative justice as a normative analytical tool) have had to be abandoned. On the contrary they have felicitously opened up the possibility of studying decision-making in a range of organisational settings, and also the chance of applying the analytical framework to decision-making by medical practitioners.

The results of the endeavour are presented in the following chapters.

## CHAPTER 5 - INDUSTRIAL DISABLEMENT BENEFIT

### Part I - BACKGROUND

#### 1 - The Evolution of the Industrial Injuries Scheme

The social security system in Britain should not be considered a static entity; it has grown and contracted (though mostly grown) in response to a complex matrix of economic, social and political pressures such that in the late 1980s over thirty benefits exist each with its rationale, specific rules, and administrative structure adapted to meet particular requirements and expediencies. It is only in the last ten years or so that any serious effort has been made to rationalise the administration of social security in the sense of identifying, and treating similarly, the common elements of the various benefits. Hence, the introduction of the unified system of independent adjudication described in chapter 3 and on a smaller scale, for example, the adoption of a common approach to overpayments of benefit.<sup>(1)</sup> Such developments though are recent, making a blanket analysis of the social security system a problematic exercise as the comparison between industrial disablement benefit and mobility allowance in this and the next chapter will illustrate.

Whilst mobility allowance is in its comparative infancy, industrial disablement benefit is one of the more venerable benefits.<sup>(2)</sup> Its direct antecedent is the Workmen's Compensation Act of 1897 which introduced for the first time the recognisable elements of an Industrial Injuries scheme, still familiar after 90 years. However, the Workmen's Compensation Act itself has its own history which, indirectly, is still relevant today. The Act gave a limited number of manual workers employed in dangerous occupations rights to lump sum compensatory payments from their employers if they suffered injury from an accident arising, in the words of the Act, "out of and in the

course of employment". Before 1897 the injured worker had to rely on the common law of negligence for any kind of remedy, which involved the costly and difficult exercise of proving that the employer was to blame for the accident. The Workmen's Compensation Act was an important advance, therefore, in dispensing with this inequitable burden on the accident victim. Nevertheless, the employer was still responsible for paying compensation and hence an adversarial mode of settlement was maintained as the employers, or more usually their insurance companies with whom they insured themselves against such payments, sought to minimise the sums they paid out in compensation.

Over the next forty years, until the outbreak of the Second World War, the principles of the 1897 Act were extended, principally in the Workmen's Compensation Act of 1906 which brought within the scope of the scheme all manual workers and certain non-manual workers, and made compensation payable to victims of certain prescribed diseases and injuries. But in essence the scheme retained its fundamental basis. During this time though there were growing criticisms concerning the operation of the scheme, in particular, of the sometimes unscrupulous practices of insurance companies in putting pressure on injured workers to accept low settlements. A Royal Commission was established in 1938 to review the scheme but the outbreak of the war prevented it from completing its work. However, Sir William Beveridge assumed the task in his comprehensive review of social insurance and produced recommendations for the reform of the Industrial Injuries scheme in his Report.<sup>(3)</sup> The whole basis of compensation for industrial injuries was considered to be inappropriate and undesirable, and he recommended that the insurance companies and the courts should be removed from the determination and administration of payments. Instead the state should operate a contributions-based scheme comprising a short-term benefit ('disability benefit' to run for 13 weeks), a longer-term benefit for those still incapacitated after 13 weeks (the 'industrial pension' based on the employee's previous

earnings), and a benefit payable to the widow and other dependants in the case of death (called the 'industrial grant').

Beveridge's overall thrust was accepted by the post-war Labour Government whose philosophy is admirably caught in a quotation from the then Home Secretary, Herbert Morrison:

"I do not want the workman's position to be that he should have to claim from his employer or the employer's insurance company and that he should have to have an argument with them. I want him to have certain social rights conferred upon him because of his injury. I want him to go to a public office to state his claim, and I want the officer at that office not to regard the workman as someone with whom he must contend and whom he must resist. I want the officer's attitude to be that he has been called upon to administer the law and regulations fairly. I want him, therefore, to give the workman all the help he can and also freely to meet the arguments of the trade union officer and help him in any way that may be desirable." (quoted in Brown, 1982, p.27)

However, on the detail of a reformed scheme there was considerable departure from Beveridge. In the subsequent 1944 White Paper a more complex series of benefits was proposed: a short-term 'industrial injuries allowance' which was similar to the Beveridge notion, plus a long-term 'industrial pension' (based not on earnings but an assessment of the disability suffered by the worker<sup>(4)</sup>) and an 'industrial death benefit' (along the lines of the 'industrial grant') formed the core of the scheme. These could be supplemented by additional benefits aimed at particular groups of claimants; the hospital treatment allowance could be claimed by workers hospitalised by their industrial injury, an unemployability supplement was available for those rendered unemployable by injury, and a constant attendance allowance for those assessed at 100% disablement and who needed frequent attention from another person.

The House of Commons debate which followed centred around benefit levels and the intention to abandon any notion of an earnings-related

element to the scheme. As a result the National Insurance (Industrial Injuries) Act 1946 contained changes from the White Paper: the gap between benefit rates for industrial and non-industrial caused illness and disability was increased, the short-term benefit (now to be called industrial injury benefit) was increased and made payable for 26 instead of 13 weeks, and the appeal system was widened.<sup>'5'</sup> However, an earnings-related addition, whilst coming into effect at the same time as the other provisions, was not added until the last minute; this was the 'special hardship allowance' for those whose earning capacity had been impaired by their injury.<sup>'6'</sup>

The 1946 Act came into operation in 1948 at the same time as the National Insurance Act 1946 and the National Health Act 1946 which established the National Health Service. For the next thirty to thirty-five years the 1946 scheme remained largely unchanged (although another additional benefit, the 'exceptionally severe disablement allowance', was introduced in 1966 intended to assist those, as the name suggests, with particularly severe disabilities<sup>'7'</sup>). However, the legal foundation of the scheme was assumed by the consolidating Social Security Act 1975. The scheme received a qualified seal of approval from the 1978 Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Commission) which, whilst recommending extensions to existing provisions (for example, by the addition of a number of new prescribed diseases), endorsed the scheme as having "stood the test of time". Criticisms in the 1980s have centred around the failure of the scheme to compensate adequately those seriously disabled compared with those with only minor conditions;<sup>'8'</sup> the high cost of administering the scheme which does not now offer (due to relative changes in benefit rates) much greater payments than other sickness schemes;<sup>'9'</sup> and the inequity of discriminating against equally disabled people whose condition is derived from other, non-work related causes.<sup>'10'</sup>



Whilst the empirical part of this study was being undertaken in the Spring and Summer of 1986, the only significant result of these criticisms had been the abolition of the short-term injury benefit in 1982.<sup>(1)</sup> The changes to the scheme introduced by the 1986 Social Security Act were then only the subject of rumour and speculation. In mid-1986 therefore the scheme comprised industrial death benefit and the long-term industrial disablement benefit (payable after 90 days from the date of the accident or the onset of the prescribed disease) plus its additions, special hardship allowance, unemployment supplement, constant attendance allowance, hospital treatment allowance and exceptionally severe disablement allowance.

## 2 - The Legislation

This chapter is primarily concerned with the administration of industrial disablement benefit itself rather than its additions or industrial death benefit. However, in the course of collecting the empirical data the difficulties inherent in making special hardship allowance (SHA) decisions were repeatedly mentioned by adjudication officers, HEOs, Regional Office staff and OCAO staff. The following analysis, therefore, also considers SHA decision-making. In consequence this section deals only with the relevant parts of the legislation before the 1986 Social Security Act dealing with disablement benefit and SHA; these are contained mainly in the Social Security Act 1975. (Unless otherwise specified, references to legislation in this section will refer to the 1975 Act.)

Entitlement to the range of industrial injuries benefits is primarily based on satisfying one of two qualifying conditions, the first relating to accidents, the second to prescribed diseases and injuries. Section 50(1) of the 1975 Act lays down the basic test to be satisfied for industrial accidents:

"... where an employed earner suffers personal injury caused after 4th July 1948 by accident arising out of and in the course of his employment, being employed earner's employment, there shall be payable to... him the industrial injuries benefits specified..."

This section still retains some of the wording of the 1897 Workmen's Compensation Act, ie "out of and in the course of employment...", although it was acknowledged to be troublesome as far back as 1920 when the Holman Gregory Report<sup>'12'</sup> noted that "... no other form of words has ever given rise to such a body of litigation" (quoted in Brown, 1982, p.76). Section 50(1) contains a number of conditions which must be satisfied; there must be, firstly, personal injury; secondly, there must have been an accident which caused the injury, and thirdly, the accident must have arisen out of and in course of employment. (How these questions are determined will be considered in Parts II and III of this chapter). It is the difficulty in the exact interpretation of the law here that has accounted for a wealth of case law since 1948 and has led to the series of provisions in the 1975 Act designed to deal with some of the more common problems. Section 51 elaborates the meaning of 'employed earner's employment'; s.52 specifies the eligibility of an accident victim who was acting in breach of regulations; s.53 seeks to explain how people involved in accidents while travelling should be treated; s.54 deals with accidents occurring whilst an employee is responding to a real or supposed emergency; and s.55 deals with accidents arising from skylarking.

The alternative route to eligibility for the range of industrial injuries benefits is for a worker to establish that he is suffering from a prescribed disease or injury caused by a prescribed occupation. Section 76(1) of the 1975 Act states the conditions to be satisfied:

"... there should be payable, in respect of a person who has been in employed earner's employment ... such benefits ... in respect of any prescribed disease or personal injury ...

being a disease or injury due to the nature of that employment and developed after 4th July 1948."

As with accident cases there are three separate tests to be satisfied by a claimant. Firstly, he or she must be suffering from a prescribed disease, secondly, that prescribed disease must be prescribed in relation to his or her employment, and thirdly, the disease must have been caused by his or her employment. In most cases if the first two conditions are satisfied then there is a presumption that the third is also satisfied. However, there are exceptions to this general rule. For example, for the presumption to apply in the case of occupational deafness then the claimant must prove that he or she has worked in the prescribed occupation at some stage during the five years preceding a claim and that on aggregate that he or she has worked for at least ten years in that occupation.<sup>(13)</sup>

The Secretary of State has the responsibility for determining which diseases and injuries should be prescribed and in relation to which occupation. Section 76(2) spells out his powers:

"A disease or injury may be prescribed in relation to any employed earners employment if the Secretary of State is satisfied that -

a) it ought to be treated, having regard to its causes and incidence and any other relevant considerations, as a risk of their occupations and not as a risk common to all persons; and

b) it is such that, in the absence of special circumstances, the attribution of particular cases to the nature of the employment can be established or presumed with reasonable certainty."

The list of prescribed diseases has been amended as new occupations have been established, as industrial processes have changed or knowledge of the aetiology of diseases has improved; for example, occupational deafness was added in 1973, occupational asthma in 1982, and vibration white finger in 1985. In 1985 the various regulations were consolidated in the Social Security (Industrial Injuries)

(Prescribed Diseases) Regulations (SI 1985/967) and the various diseases and injuries reclassified into four separate groups covering conditions due to physical agents (group A), conditions due to biological agents (group B), conditions due to chemical agents (group C) and miscellaneous conditions (group D). Thus, for example, PD A10 is occupational deafness, PD B8 viral hepatitis, PD C18 poisoning by cadmium, and PD D1 pneumoconiosis.

To be entitled to a disablement gratuity or pension (the two forms of disablement benefit) a claimant must show that:

"... he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 1%." (section 57(1))

For an assessment of between 1% and 19% inclusive, a disablement gratuity (ie a lump sum) is payable, for assessments of 20% and above a weekly disablement pension is paid (s.57(5) and (6)). The act of assessing the extent of disablement is therefore a vital stage and a schedule to the 1975 Act is devoted to how this should be carried out:

"... the extent of disablement shall be assessed, by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty..." (Schedule 8, para. 1)

The disabilities to be taken into account should be all those that have arisen from an accident which the claimant has suffered "as compared with a person of the same age and sex whose physical and mental condition is normal" (para 1(a)). No other factors (such as economic or social circumstances) are to be considered (para 1(c)).

Paragraph 4 of Schedule 8 allows the assessment to be made for a limited period (a 'provisional' award), for a specified period after which the award will cease, or for life (both of which are called 'final' awards). Paragraph 5 notes that awards over 20% can only be

made in multiples of 10 such that, if an assessment is made that is not a multiple of 10, then it will be rounded up or down accordingly.

The actual level of assessment is either dictated by or guided by Schedule 2 to the Social Security (General Benefit) Regulations 1982 (SI 1982/1408). For some fifty-five disablements there is a prescribed percentage assessment; for example, the loss of a thumb is rated at 30%, loss of index finger at 14%, loss of two phalanges of the index finger at 11%. For some the description is extremely precise, for example, amputation below the knee with stump of between 9 and 13 centimetres is assessed at 50% disablement, whilst for other conditions the medical authorities must make their assessment by comparing the relevant disablement with the scheduled assessments and coming to a reasonable figure.

The most important of the additions to disablement benefit is the special hardship allowance (SHA). It is designed to assist those whose earnings have been impaired by their disablement. Section 60(1) of the 1975 Act sets out the details:

"The weekly rate of a disablement pension shall ... be increased ... if, as the result of the relevant loss of faculty the beneficiary -

(a) is incapable, and likely to remain permanently incapable, of following his regular occupation; and

(b) is incapable of following employment of an equivalent standard which is suitable in his case, or if as the result of the relevant loss of faculty the beneficiary is, and has at all times since the end of the period of ninety days ... incapable of following that occupation or any such employment."

Section 60(2) seeks to clarify some of the terms in s.60(1):

"(a) the reference to a person's regular occupation is to be taken as not including any subsidiary occupation of his;

(b) the reference to employment of an equivalent standard is to be taken as not including employment other than employed earner's employment;  
and in assessing the standard of remuneration in any

employment, including a person's regular occupation, regard is to be had to his reasonable prospects of advancement."

However, this subsection needs clarification of its own in subsection (3):

"For the purposes of this section, a person's regular occupation is to be treated as extending to and including employment in the capacities to which the persons in that occupation (or a class or description of them to which he belonged at the time of the relevant accident) are in the normal course advanced, and to which, if he had continued to follow that occupation without having suffered the relevant loss of faculty, he would have had at least the normal prospects of advancement; and so long as he is, as a result of the relevant loss of faculty, deprived in whole or in part of those prospects, he is to be treated as incapable of following that occupation."

The amount of SHA, up to a prescribed maximum, is determined in accordance with s.60(6):

"... the amount ... shall be determined by reference to the beneficiary's probable standard of remuneration during the period for which it is granted in the employed earner's employments, if any, which are suitable in his case and which he is capable of following as compared with that in his regular occupation..."

The plethora of qualitative and hypothetical judgements that are required to be made by s.60 are the cause of innumerable problems for the independent statutory authorities in their determination of entitlement and of the amount of benefit payable. Parts II and III of this chapter will explore these in detail.

### 3 - Some Illustrative Statistics

The major source of published statistics on the Industrial Injuries scheme is the annual 'Social Security Statistics' produced by the DHSS, which first appeared in 1972. It is a peculiarly unhelpful document in many respects and in particular leaves many gaps, or only presents a partial picture, in its treatment of industrial injuries.<sup>'14'</sup> Nevertheless, this section will draw upon these tables to give an indication, as far as is possible, of the scope and coverage of disablement benefit and special hardship allowance.

TABLE 5.1 - Number of Industrial Disablement Benefit assessments made per year (in thousands)

	Gratuities <sup>'a'</sup>		Pensions <sup>'b'</sup>	
	accidents	P.D.s	accidents	P.D.s
1966	247	9	29	2
1971	203	9	21	2
1976	168	6	16	3
1978	170	6	15	2
1979	163	6	14	2
1980	151	5	12	3
1981	136	5	10	2
1982	130	4	9	1
1983	118	4	10	2
1984	117	4	10	4
1985	117	5	8	2

Sources: Social Security Statistics, 1986 and 1987, Table 21.10

(a) lump sum gratuities are made for assessments of between 1% and 19%

(b) weekly pensions are payable for assessments of 20% and over

The figures in Table 5.1 show how the incidence of industrial accidents and prescribed diseases has declined over the last twenty years. This fall can probably be attributed to a combination of causes, such as the decline in traditional heavy industries,<sup>'15'</sup> the



use of safer working practices, and the introduction of wider safety legislation (in particular the Health and Safety at Work Act 1974).

Gratuities are, by definition, one-off payments, but pensions are payable on a weekly and continuing basis. Table 5.2 shows the number of recipients of a disability pension and shows a gradual trend downwards.

TABLE 5.2 - Number of Disability Pensions current at 30th September  
(in thousands)

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1966	202
1971	205
1976	202
1979	198
1980	196
1981	192
1982	189
1983	188
1984	189
1985	186

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Sources: Social Security Statistics 1986 and 1987, Table 21.30

The importance of the special hardship allowance noted in the previous section is shown by the large number in receipt of this benefit in Table 5.3, which also demonstrates how the level of disablement may be relatively low yet can still impair the claimant's earnings potential.

TABLE 5.3 - SHA current at 30th September (in thousands)

	disablement of 1% - 19%	disablement of 20% or more	total <sup>(a)</sup>
1966	n/a	n/a	137
1971	78	64	144
1976	85	58	145
1978	89	58	149
1979	90	57	148
1980	90	56	147
1981	90	55	146
1982	91	53	144
1983	93	52	145
1984	94	52	145
1985	96	50	147

Sources: Social Security Statistics 1971-1987, Table 21.42

(a) rounding of figures has resulted in the total not necessarily matching the figures in the other two columns

Whilst the published figures illustrate the number of beneficiaries of disablement benefit and SHA they do not properly show how the burden of work that they generate is distributed throughout the country. In practice there are extremely large differences in the number of industrial injury cases processed by individual local offices. This is partly due to the size of the offices and their catchment areas (particularly the relevant industrial geography), and partly to organisational influences (such as the partial centralisation of disablement benefit adjudication in the London South region). Table 5.4 shows the differential workloads in the thirteen offices visited in this study.

TABLE 5.4 - Illustrative Local Office workloads for the six months, August 1985 to January 1986

Region	Office	Accident <sup>(a)</sup> decisions	Dis. Ben. decisions	SHA decisions	Total
Scotland	Cowdenbeath	103	147	311	561
	Dundee (E)	72	74	81	227
	Perth	62	44	73	179
	Edinburgh (N)	44	60	51	155
	Glasgow (City)	20	23	14	57
North East	Doncaster (W)	349	469	803	1621
	Rotherham (S)	326	463	505	1294
	York	245	225	114	584
	Dewsbury	177	162	120	459
	WallSEND	97	159	100	356
London (S)	Broadstairs	287	1244	1760	3291
	Hastings	383	574	1215	2172
	Aldershot	245	1612	2318	3930

Source: Specially prepared tables supplied by each office (1986)

(a) accident decisions are made separately from disablement benefit decisions

Table 5.4 clearly shows how SHA decision-making generates far more work than is perhaps suggested by the published statistics. This is primarily due to the frequent reassessments of earnings and hypothetical earnings that need to be made on SHA awards which are typically for one or two years only (although occasionally they are made for periods as long as six years). The table also shows that some offices handle large numbers of claims, whilst for others it is only be a minor part of their work. Clearly the three Benefit Offices in London South, which deal only with disablement benefit and sickness benefit, have the greatest throughput, but others such as the Doncaster and Rotherham offices, situated as they are in the mining and industrial areas of South Yorkshire, also handle large numbers. These compare starkly with, for example, the Glasgow (City) office whose catchment area comprises an inner city area of residential

dwellings and business premises. One might expect that the offices handling the greatest number of cases would have a different experience of the difficulties involved with disablement benefit work than, say, Glasgow (City) and the other smaller offices; whether this is the case will be explored further in Part II of this chapter.

#### **4 - The Distribution of decision-making within the DHSS**

The adjudication on claims for disablement benefit and special hardship allowance (and the other additions) is, in most Regions, the responsibility of the local office. Within each, the size of the disablement benefit section will vary according to the workload generated by the relevant catchment area. Thus, small offices such as Cowdenbeath and Wallsend, which cover industrial areas, have a comparatively large disablement benefit section. In contrast, a large office may have little disablement benefit work; for example, the mostly inner-city residential and business areas covered by the Glasgow (City) office produce few disablement benefit claims.

The one exception to this pattern is the London South Region where adjudication on disablement benefit (and sickness benefit) has been concentrated since 1984 in three 'Benefit Offices' (BOs) in Aldershot, Broadstairs, and Hastings. The 'outstations', as they are called, were created in the 1970s to administer sickness benefit for the Region to relieve pressure on DHSS offices in London where recruitment was proving difficult. When statutory sick pay (SSP) was introduced, however, the workload of the outstations dropped dramatically. The problem of what to do with the now superfluous staff was solved not by redeploying or sacking them but by adding disablement benefit to their responsibilities. Disablement benefit was chosen because within the largely non-industrial South East of England it was a small-scale benefit spread thinly among the local offices, and hence prone to a lower standard of administration than other benefits.

## Part II - THE THEORY AND PRACTICE OF DISABLEMENT BENEFIT DECISION-MAKING

### 1 - The Formal Arrangements

Industrial disablement benefit is one of the well-established National Insurance benefits whose decision-making arrangements have been considered to have stood the test of time, so much so that they were used as a model for the administration of the reformed Supplementary Benefits scheme in 1980. As with all social security benefits which incorporate some notion of disability in their eligibility criteria, there are separate medical and lay questions to be addressed. Partly for administrative reasons, decision-making is organised so that as many of the lay questions are considered initially in order that the expense of convening a medical board or of obtaining a medical report is not incurred on those cases which will be rejected for failing to meet one of the lay requirements.

The two alternative routes to disablement benefit, ie by suffering an industrial accident or by contracting a prescribed disease, necessitate slightly different decision-making arrangements. The first stage in accident cases is to establish whether or not an industrial accident within the meaning of the legislation has in taken place; only if it has can the claimant proceed with a claim for disablement benefit. Making an 'accident decision' is therefore a discrete process within the local office since such decisions can be made in isolation from any other social security considerations. Indeed a claimant has an entitlement under s.107(2) of the 1975 Act to have the accident question determined separately. There are two main instances where this is usually invoked. Firstly, it will have been noted from the section on the legislation that a claimant is not bound by any time limits on making a claim for disablement benefit; as long as he can prove personal injury from an accident that happened after 4th July 1948 then he has a valid claim. The effect of this in

practice is that many claimants wish to establish as soon after they have had an accident at work that it can be classified as industrial, not perhaps because they wish to claim any social security benefit immediately but rather as a safeguard for the future in case they develop any disabling condition in later years which may incapacitate them or affect their earnings potential. For this reason many Trades Unions in certain industries encourage workers to register even what may seem at the time the most trivial of incidents. The second reason for seeking to register an industrial accident is that s.50(A) of the 1975 Act allows claimants with inadequate National Insurance contribution records to claim sickness benefit to be eligible for the benefit nonetheless if the relevant period away from work was due to an industrial accident.

If it is established that an industrial accident has occurred then the claimant can proceed with a claim for disablement benefit. The next set of criteria which must be satisfied is medical in nature and defined in s.108(1) of the 1975 Act as comprising 'disablement questions'; it reads:

"(1) In relation to industrial injuries benefit and severe disablement allowance the 'disablement questions' are the questions -

- (a) in relation to industrial injuries benefit whether the relevant accident has resulted in a loss of faculty;
- (b) in relation to both benefits at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment."

The responsibility for deciding the disablement questions lies with the adjudicating medical authorities (s.108(2)), defined as either a single doctor acting in the capacity of an adjudicating medical practitioner (AMP), or two such doctors acting as a medical board, or a medical appeal tribunal (MAT).

The arrangements for deciding claims to disablement benefit as a result of a prescribed disease are slightly different, though there are again both lay and medical criteria to be satisfied. The lay questions are collectively called the 'prescription test' and are considered by the local office adjudication officer, ie on the evidence presented to him he must decide whether the claimant's employment matches the specification of the relevant prescribed occupation in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985. If the prescription test is satisfied the adjudicating medical authorities (in practice a medical board in the first instance) will consider the 'diagnostic test', ie whether the claimant is actually suffering from the prescribed disease or injury as he claims. This invariably requires a report from an authority in the field (usually a hospital consultant) which can be considered by the adjudication officer; alternatively, the decision can be referred to a medical board. If the diagnostic test is satisfied then the board will consider the extent of disablement in accordance with s.108(1)(b) cited above. In cases involving pneumoconiosis, byssinosis or asbestosis the diagnostic test and disablement assessment are initiated immediately a claim is received because of the poor prognosis for claimants suffering from these usually fatal conditions. Otherwise the prescription test is considered and decided before any medical enquiries are undertaken (this is an administrative arrangement, the legislation does not prescribe the order in which lay and medical decisions are considered).

Whilst the final outcome of a claim for disablement benefit, whether due to an industrial accident or prescribed disease, is a mixture of lay and medical adjudication decisions, the determination of entitlement to SHA (and the amount of benefit) is wholly a lay responsibility. However, in all cases medical advice will be sought of a medical board as to the claimant's capacity for continuing in his regular or an equivalent occupation. Since disablement benefit and SHA are often claimed together, this assessment is frequently carried



out at the same time as the disablement questions are being considered. However, a claimant may not know immediately the effect of his condition on his working ability and so claim SHA at a later date, thus necessitating a separate examination. On all the lay questions discussed above (the accident decision, prescription test, SHA entitlement) an aggrieved claimant has the right of appeal to an SSAT, whilst on the disablement questions he may appeal to an MAT. On points of law, further appeal lies to the Social Security Commissioner (on the medical content of industrial disablement benefit decisions the MAT is the final arbiter).

#### (a) The claiming process

An application to register an accident at work as an industrial accident is made by the claimant on DHSS form BI 95. In the local office it is received by a clerical officer who will initiate enquiries in order that the adjudication officer will have sufficient evidence on which to make a decision. An enquiry to the claimant's employer is automatically sent using a standard form (BI 76) and in most cases some further information is required of the claimant. The replies are scrutinised by the clerk who may decide to pursue a further enquiry if, for example, a question has not been answered, or seek the advice of the supervisor as to whether sufficient information has been accumulated.

If an industrial accident is confirmed, the claimant is sent a form (BI 100A) on which to claim disablement benefit. If it has been completed correctly the clerk forwards the papers to the Regional Office (or Central Office in Scotland) where the Medical Boarding Section will arrange for the claimant to be examined and assessed by one or more AMPs. The results of the AMP or board's examination are sent (on form BI 118) via the Regional Office to the local office where the final decision on the whole claim is formally made by the

adjudication officer. Finally, the claimant is advised of the outcome.

To claim disablement benefit because of a prescribed disease the claimant must complete a general claim form (BI 100B) or one of the specialised series of forms for specific conditions (for example, for occupational deafness, or for occupational asthma). Again enquiries will be made of the employer (on form BI 77 or one of its specialised equivalents). On all prescribed diseases the next step is always the acquisition of a consultant's report on which the diagnostic questions can be decided which this is obtained via the Regional Medical Officer or one of his staff. The process thereafter is the same as that for claims based on industrial accidents.

SHA claims are made by the claimant to the local office. The papers are forwarded to the Regional Office to arrange a medical board and the results returned to the local office. When claimants have been assessed as being incapable of following their regular occupations but capable of 'suitable alternative employment' they will be invited into the local office to discuss the occupations that they may be capable of pursuing. The disablement benefit clerk will endeavour to secure their agreement on at least one 'suitable alternative employment'. When this has been agreed the clerk will investigate the earnings in the claimant's regular occupation (from an employer, where there is one) and earnings in the agreed alternative(s) from appropriate local employers. When the level of SHA has been calculated from the available evidence the claimant is notified of the decision. The diagram on the following page illustrates the progression of a claim through the system.

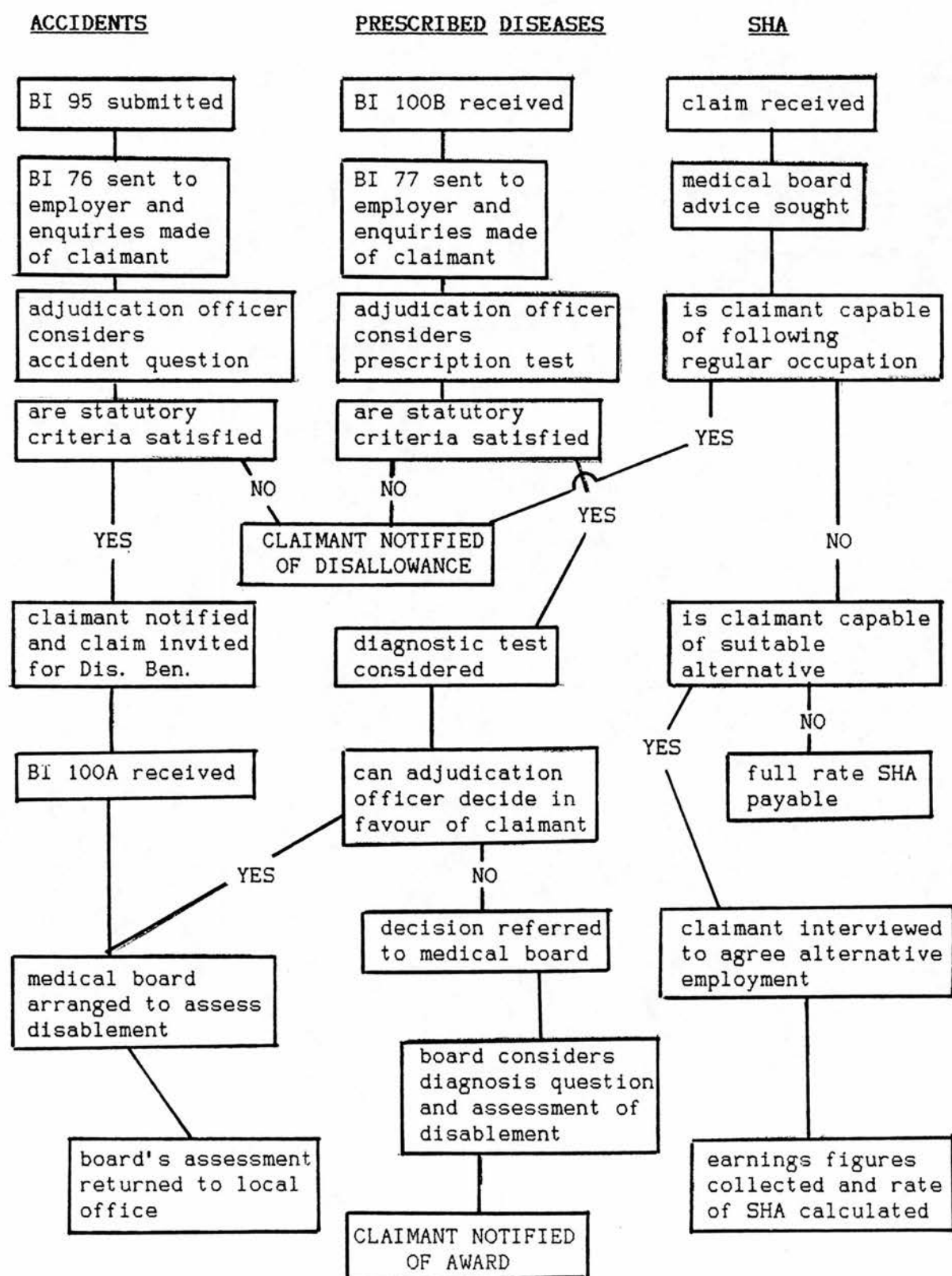


FIGURE 5.1 - The disablement benefit and SHA decision-making processes

## 2 -Decision-making in practice: the lay questions

### (a) Industrial Accidents

In deciding whether or not an accident at work qualifies as an industrial accident under the 1975 Act, the adjudication officer needs only to consider one subsection of the legislation, s.50(1) quoted earlier. In practice he will be looking for three conditions to be satisfied, ie that the claimant has (a) suffered personal injury, caused (b) by an accident, which (c) arose 'out of and in the course of his employment'. These conditions have generated a plethora of Commissioners' decisions<sup>'16'</sup> and court rulings since the 1897 Workmen's Compensation Act. Although there is now a wealth of case-law to assist adjudication officers in the legal interpretation of s.50(1), deciding whether an industrial accident has taken place can still be fraught with difficulties.

In short, the adjudication officer will be looking for evidence that some sort of incident (or series of incidents) <sup>h</sup>was taken place which caused an injury to the claimant (however minor), and that such an incident occurred during working hours in a normal place of work whilst doing something connected with the work. The problems that frequently arise are derived partly from the law and partly from difficulties with the content or nature of the evidence.

Before the statutory criteria can be applied the adjudication officer must be satisfied that there is sufficient evidence on which to adjudicate. However, for some reason the evidence may be incomplete, it may be unsupported (for example, the adjudication officer may only have the claimant's uncorroborated account of events), or it may be contradictory in some way, (sometimes a claimant's evidence will lack consistency or the evidence from several sources, perhaps witnesses, may not concur). The BI 95 form completed by the claimant is often the first source of problems; despite the often difficult inter-

pretation of statutory provisions the claimant is given only half a dozen lines in which to respond to the question 'What were you doing at the time [of the accident] and how did the accident happen?'.<sup><17></sup> As a result the quality of the initial evidence from the claimant can sometimes be poor and this will frequently necessitate further enquiries. The following summaries of actual case-notes illustrate the difficulties that can confront the adjudication officer.

**Case #1 - A problem of unsupported evidence**

A miner walking back to the lift from the coal face along the uneven surface of the pit floor claimed that he slipped and fell injuring his leg and foot. There were no witnesses. However, the claimant had reported the incident which was recorded in the pit's accident report book, which was sufficient to persuade the adjudication officer that an industrial accident had taken place.

When faced with problems in the evidence the adjudication officer must make his decision from whatever choices are available, on the 'balance of probabilities', ie he must weigh each piece of evidence and decide if it is likely to be true and, if it is, whether or not it is in favour of the claimant.

**Case #2 - A problem of conflicting evidence**

An oil rig worker claimed an industrial accident had taken place when he struck his shovel into a grating and strained his abdominal muscles. The claimant's application was received in April 1985 although the incident, which he stated had been reported to his employer, was alleged to have taken place on September 19th, 1984. The BI 76 was returned by the employers stating that they had no knowledge of such an incident and that it had not been reported. The claimant was informed of this reply and asked to supply the names of any witnesses who could support his account. At this stage the claimant requested an interview with the local office at which he said that he had been

told by his employer that a record had been made of the incident although he admitted that he had not seen it himself; he also gave the name and address of a witness who was subsequently asked to supply his version of events. A further enquiry was made of the employers noting the claimant's response, the reply to which restated that as far as they were concerned the incident had not taken place; furthermore they noted that the day before the alleged incident they had a staff record that the claimant had complained of abdominal and chest pains. The putative witness replied that he had no recollection of such an incident. (The adjudication officer decided that the evidence collected was sufficiently against the claimant to justify disallowing the claim.)

There is no prescribed time limit within which an industrial accident must be registered, though a claim is usually made soon after an alleged incident. The next case illustrates the circumstances in which a claim can be made long after the accident and the problems that this can cause.

### **Case #3 - A problem of old, cold evidence**

In November 1985 a policeman made a claim for disablement benefit because of an accident which he alleged on the BI 95 occurred in the 'mid-70s' when his neck was injured whilst restraining a drunk. The adjudication officer tried to ascertain greater details of the incident in order to determine whether an industrial accident had taken place and if so when. Fortunately for the policeman he unearthed his notebook of the time and supplied the adjudication officer with a copy of his own record of the incident. Furthermore, he was able to track down a copy of the Station Incident Book which recorded the tussle between the claimant and the alleged offender but had no record of any injury incurred (by either party). However, the name of another officer who was present at the time was recorded and he was



subsequently asked to give his recollection of the incident (which it had now been established took place in 1977). Not surprisingly this witness's memory of the incident was a little vague and although he could recall the encounter he could not confirm that the claimant had been injured at the time. At this point there was no more evidence that the adjudication officer could even attempt to find, a decision had to be made on what was available. He decided that since there was no doubt that the alleged incident did take place and that it was entirely likely that a neck injury could be sustained in a tussle, plus the fact that the claimant was, as a policeman, considered a reliable witness, then an industrial accident had taken place.

Problems with the interpretation of the law revolve principally around the phrase 'out of and in the course of employment'. In the following example the evidence was perfectly clear, the claimant's account was supported by his employer and corroborated by a witness.

**Case #4 - A problem of interpreting 'out of and in the course of, etc'**

An engineering worker was walking across the yard of the factory where he normally worked on his way to an interview for promotion within the same firm. He tripped in a small pothole and sustained a broken ankle. The question for the adjudication officer to determine, therefore, was whether the accident happened 'out of and in the course of employment', ie whether walking to an interview could be considered to fall within the scope of this phrase. Had the claimant been seeking a job with another employer on premises elsewhere the adjudication officer conjectured that he would have disallowed the claim. But in this case he concluded that such activity was in the interests of the claimant's employer (who had encouraged the claimant's application for the post) and hence satisfied the condition.



Another similar example illustrates how difficulties with the law can be exacerbated by problems connected with the evidence.

**Case #5 - A problem of interpreting both the law and the evidence**

A lorry driver was sleeping overnight in his cab away from home. During the night he was attacked and sustained serious head injuries. The brain damage which he suffered prevented him from supplying any evidence directly. The only evidence available, therefore, apart from the man's injuries, was indirectly from the assailants themselves. However, at their subsequent trial they claimed in their defence that they had been provoked and attacked initially by the claimant. That an incident had taken place was not in any doubt but it was not clear to the adjudication officer that sleeping in the cab of a lorry was 'out of and in the course of employment' since the driver was officially off-duty at the time and not being paid. However, it was confirmed by the employer that it was an accepted practice that drivers slept with their vehicles (where they could provide at least some protection for the lorry's load) and kept their overnight expenses. The adjudication officer, therefore, accepted that the driver was acting in the interests of the employer and allowed the claim.

Despite the difficulties that can arise with accident decision-making, most adjudication officers interviewed responded that the majority of claims were straightforward. One commented:

"Generally speaking, about 80% of accident cases consist mainly of a report by an employer and a declaration by a claimant, which together allow me to come to a decision."  
(Adjudication Officer, Office #2)

The implication here is that around 20% of the cases of this adjudication officer require additional evidence, which reinforces the importance of the information stage of the decision-making process. This importance will be emphasised further in the following discussion of prescribed diseases decision-making.

(b) Prescribed Diseases and Injuries

There are fifty-four prescribed diseases and industrial injuries listed in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, each accompanied by a description of the relevant prescribed occupation (a few of which apply to more than one disease). For adjudication officers, however, the bulk of their work in this area will be dominated by a small number of prescribed diseases, namely dermatitis (PD D5), tenosynovitis (PD A8) and occupational deafness (PD A10) which between them account for 90% of awards<sup>'18'</sup> (and if four other common conditions are added, ie cramp to the hand or forearm, beat hand, beat knee (housemaid's knee) and beat elbow (tennis elbow), the figure is increased to 98%). Of all the prescribed diseases discussed with adjudication officers occupational deafness was considered by almost all of them to present the most problems.

Occupational deafness

The eligibility criteria for occupational deafness are arguably the most complex of all prescribed diseases. The reasons for this lie in the intention behind the regulations. Damage to hearing caused by exposure to noise at work has long been recognised as a risk in some industries, but a deterioration in a person's hearing is also a normal feature of ageing for most of the population.<sup>'19'</sup> The prescription test is therefore designed to identify industrially-caused deafness; hence, the regulations specify a range of frequencies over which hearing loss must have occurred,<sup>'20'</sup> and a comprehensive list of machinery and the circumstances in which it must have been used. There is also the requirement that exposure must have lasted for at least 10 years,<sup>'21'</sup> the last exposure being not more than five years before a claim is submitted. The adjudication officer, therefore, needs information on the claimant's work, the machinery used, the physical characteristics of the workplace, the type of exposure

endured and, in order to satisfy the five and ten years tests, the claimant's employment record. This is formidable in itself but one must also remember that some of this information will relate to periods many years beforehand (and because of the ten year test, some of it will always be at least 10 years old). And it is possible that information from as far back as 1948 will be relevant (and sometimes crucial). The most common problem for adjudication officers was incomplete information. For example, in some skilled professions it is quite common for workers to be employed on temporary contracts interspersed with short periods of unemployment, as the following case-note illustrates.

**Case #6 - A problem of incomplete information**

A joiner made his living by working in the shipyards of North East England. The nature of shipbuilding is such that joiners and carpenters are only employed during specific phases (ie fitting out) and not throughout the whole of the construction of the ship. Workers therefore tend to move from yard to yard as work becomes available. Joinery per se is not a particularly noisy activity but the claimant was exposed to the usual, high-level noise of the shipyard which would bring him within the scope of the regulations. The claimant had worked for forty years since 1944 and listed 120 spells of employment in that time with a large number of employers (though not all in the yards). So, the task of collecting enough information to satisfy the ten year test was hampered firstly, by the need to aggregate a large number of short periods of employment, secondly, by the long period which had elapsed since some of them (which meant that employers did not have the records of his time with them), and thirdly, by the closure of many of the firms that the claimant had worked for (as the shipbuilding industry has declined since the war). After four months of enquiry the adjudication officer had confirmation of only 5½ years relevant employment and was forced to reject the claim.

As in the case above, to satisfy part of the prescription test it is not necessary for the claimant to have worked with the relevant machinery or equipment himself but merely to have been 'wholly or mainly in the vicinity of' the prescribed machinery. Before the adjudication officer grapples with the legal complexities inherent in this phrase he must gather evidence concerning how far the claimant worked away from the machinery and whether there were any intervening obstructions which may have afforded him some protection. For work carried out many years previously this can prove extremely difficult and often impossible to obtain. Recourse frequently has to be made to colleagues of the claimant to supply their personal recollections of working conditions. Prescription is also partly based on the type of equipment or machinery that caused the relevant noise. Hence the adjudication officer needs to know what tools etc. the claimant worked with (or near), which again can be extremely difficult to collect; the claimant may not know exactly what he was using or how to describe it, or alternatively it may be obsolete. (22)

#### Wider problems of evidence on prescribed diseases

Even when evidence is supplied by the claimant there is often doubt over its validity. Some adjudication officers commented that they did not always trust the replies of employers or the claimant's workmates. This was put down to a variety of innocent reasons (for example, ignorance, confusion caused by official forms) and more ulterior motives (for example, collusion between work colleagues, fear of civil action against the employer).

"Occupational deafness has caused most problems; for example, with replies from employers not answering the questions properly. I think this is due to them considering different aspects to us when dealing with a common law claim; they seem to think we will want the same sort of information, but we don't." (Adjudication Officer, Office #7)

"On one case I remember the employer had answered 'Yes' to a question whereas I knew they didn't work with that kind of

material. I telephoned the employer to make sure and they eventually rang back to say that the answer was wrong." (Disablement Benefit Clerk, Office #6)

"Using witnesses is difficult because they may be in cahoots; we would prefer to go to managers or foremen because they are more trustworthy." (ex-Adjudication Officer, Office #1)

Adjudication officers may also experience difficulty with understanding the evidence that is provided since much of it will be of a technical nature regarding industrial processes, machinery and substances.

"Sometimes you feel ... that you are not really qualified to make a decision; you can keep going back to the employer for more details, but it is not much use if in the end you don't understand the information that you have collected." (Adjudication Officer, Office #12)

"... on some of the poisoning cases it is very difficult to find out if, say, a printing ink that a man has been working with contains the requisite chemicals, which may have several different descriptive names." (Adjudication Officer, Office #6)

The information problems of adjudication officers were summed up in a comment of a member of one of regional monitoring teams:

"The problems for adjudication officers are not really adjudication problems; they relate more to the information; they know what they want but can't get it." (Monitoring team member, Region #2)

Many adjudication officers felt that though difficult, collecting adequate information on which to decide a prescription test was a challenging part of the work and there were frequent examples of painstaking research on their part. Local libraries are visited, trips are arranged to local factories, works and mines in order to gain some first-hand appreciation of the jobs that claimants undertake, and personal contacts are exploited. For some adjudication officers and clerks their local knowledge was a considerable asset (as

the quote from the disablement benefit clerk above illustrates).

"I do use my accrued knowledge of engineering and shipbuilding, and I have no hesitation in approaching friends to ask about the duties of particular jobs if I feel it will assist in deciding a case." (Adjudication Officer, Office #9)

"I was brought up in a mining village and have been down a coal mine which gave me more of an understanding of what is involved, the type of work they do and the conditions they work in." (Adjudication Officer, Office #7)

As with decision-making on industrial accidents, the majority of problems with prescribed diseases concern the collection and interpretation of the evidence. Many adjudication officers and disablement benefit clerks pursue this element of the decision-making process with diligence, but this reliance on personal initiative suggests that a claimant may be (unknowingly) disadvantaged where, for some reason, such initiative is lacking.

#### (c) Special Hardship Allowance<sup>(23)</sup>

There are two elements to special hardship allowance decision-making. Firstly, entitlement to the allowance must be established by satisfying one of the two conditions in s.60(1) of the Social Security Act 1975 (quoted on p.145). Secondly, once this has been established, the amount of special hardship allowance payable must be calculated in accordance with the other relevant subsections of s.60. The first element causes some problems for adjudication officers but greater difficulties arise in the attempt to quantify the amount.

The main problem with establishing entitlement arises from a conflict of medical evidence confronting the adjudication officer. A hypothetical example, but one which is common in practice, will serve to illustrate this. A man is injured at work and receives a medical certificate from his General Practitioner (GP) to the effect that he



should refrain from any work for a certain period. The condition persists for over 90 days and the man claims and receives a disablement benefit. He then claims special hardship allowance and is seen again by a medical board. On examination the board confirms that the man is indeed incapable of following his regular occupation, but is capable of some kind of employment nevertheless. (This typically arises when a man with a manual job sustains, say, a back injury which prevents him from lifting or standing for long periods, but is considered capable of a job that only involves sitting down.) In effect the adjudication officer is faced with evidence from the GP that the second condition of entitlement is satisfied but has contrary evidence from the medical board.<sup>(24)</sup> This dilemma is not one which the adjudication officer is competent to resolve and in practice the case is referred to the Regional Medical Officer who will advise on the case or seek a third opinion from the Divisional Medical Officer of the Regional Medical Service of the DHSS;<sup>(25)</sup> the adjudication officer is thus effectively relieved of the burden of decision-making.

The problems of quantifying the benefit are largely evidential. However, since the essence of the calculation is a comparison between the situation of the claimant in his regular occupation before, and his situation after his industrial accident (or the onset of his prescribed disease) there is the occasional problem of deciding what the regular occupation actually is. But this is now comparatively rare given the accumulated case-law of the past 40 years.<sup>(26)</sup>

The problems for the adjudication officer are threefold; establishing the claimant's pre-accident earnings in his regular occupation; deciding a suitable alternative employment where this is relevant; and deciding the post-accident earnings, either where the claimant has found further employment or in a hypothetical sense where the claimant has no work. In practice the bulk of this work falls on the disablement benefit clerk, since collecting the required information is partly a routine matter of sending forms or letters of enquiry to



local employers or the Job Centre, and partly a matter of interviewing the claimant (from which the adjudication officer is discouraged in the Insurance Officers' Guide (see chapter 3, p. 104).

Where an accident has been recent and a first claim for special hardship allowance is made, then establishing regular occupation earnings is usually straightforward. However, since special hardship allowance is subject to frequent reviews (usually every 1 or 2 years<sup>(27)</sup>) a claimant's regular occupation may disappear or the firm that he worked which supplied the original figures may have closed down. In such cases clerks will have to use a number of ploys in order to obtain some figures. They may write to another firm which employs workers doing similar work to the claimant's regular occupation; they may contact the local Job Centre; or they may contact a trade union to obtain the 'union rate' for the job. If all these fail, as they may when a job becomes obsolete (one example quoted was that of skilled stone-cutter, a manual trade, which has been replaced by machine cutting), then the last year's figure may simply be updated in accordance with the general trend in wage increases.

An infrequent but difficult problem with regular occupational earnings stems from the entitlement of the claimant to have included in the calculation a recognition of 'his reasonable prospects of advancement' (see Social Security Act 1975, s.60(3)). One case will illustrate the problems:

**Case #7 - A problem of 'reasonable prospects of advancement'**

A young man's regular occupation was as a professional rugby league player. As not infrequently happens in the sport he was injured and forced to retire from the game; he was 20. Problems arose with a reassessment of his award several years later when his club was promoted and he claimed that his regular occupation earnings would have increased as a first division player (he also added that had it not been for his injury he would have been

playing for England) and hence his special hardship allowance should be increased. The England claim was dismissed as wishful thinking (unfortunately for the claimant, the adjudication officer was a follower of the sport and assessed the claimant's potential a little less favourably) but it was accepted that his regular occupation earnings would, had he retained his place, have increased.

The second problem area is establishing what a 'suitable alternative employment' for the claimant might be. A regional office employee summed up the difficulty:

"Special hardship allowance is a problem because much of it isn't based on hard facts but on supposition or crystal ball gazing; that is, what a claimant might be able to do, if he could do a job. It's all open to debate." (Monitoring team member, Region #3)

To decide a suitable alternative employment the claimant is usually called in for an interview. The clerk will take a brief employment and educational history and, on the basis of this and the medical report (which gives a note of the claimant's disabling condition), try to agree with the claimant what alternative employment he or she could do. It is not often straightforward, as one clerk explained,

"...we get the person in and get them to agree to a job they could do. More often than not they've no idea what they can do. So we narrow it down. We say 'OK, you have a back injury so lifting is out, how about a job sitting down...' etc." (Disablement benefit clerk, Office #2)

The claimant 'having no idea' about alternative occupations was a common experience of disability benefit clerks. Most had to make suggestions to the claimant and for this purpose each had his or her own individual list of alternatives, but common amongst them were car park attendant, lift operator and supermarket cashier. These were put to claimants regardless of their previous occupation since few

apparently would deny that they could do, ie were physically capable of doing, such work. '28'

In cases where the claimant steadfastly refuses to agree to a suitable alternative employment the advice of the Disablement Resettlement Officer at the Job Centre is usually sought, by asking what, in their opinion, a person with particular physical limitations might be capable of doing. '29' A further attempt may then be made to get the claimant to agree a suitable alternative employment but ultimately the adjudication officer can, and must, make a decision without such consent.

When a suitable alternative employment, or possibly several, has been agreed the clerk will try to collect information on the appropriate wage levels and will have recourse to all the methods noted in relation to finding earnings figures for the claimant's regular occupation. The occasional additional difficulty arose here though of private employers not replying to requests for details of their wage levels.

#### (d) Summary

Nearly forty years have elapsed since the inception of the National Insurance Industrial Injuries provisions and in that time many of its legal complexities have emerged and, to an extent, been clarified, either in amending legislation or by case-law. It is, therefore, usually the more recent changes that cause the most difficulties in interpretation. However, for the front-line officials dealing with the thousands of claims for accident decisions, disablement benefit, and special hardship allowance the overwhelming problems are concerned with information collection, problems which stem ultimately from the demands made by the legislation. As this section has shown (and as further sections will reinforce) adjudication officers are often forced to 'satisfice', ie make a decision that enough time and money

have been expended in collecting the evidence and that although further enquiries could be made, a decision ought to be taken.

"... if you're not satisfied that you've got enough information to make a decision then you must continue till you are satisfied. But sometimes you reach a point where you've gone so far that you think: I can't drag this out any longer I'll have to make a decision on what information I've got." (Adjudication Officer, Office #1)

It was a position that most adjudication officers found uncomfortable, particularly in the London South Region where they have to rely on local offices to conduct interviews on their behalf.

"... on some cases you realise that it is going to take another several weeks to sort it out so you tend to, I wouldn't say make assumptions, but to make the best use of what you have got, because you know that if you do send it back you'll either get something illegible or they won't understand it." (Adjudication Officer, Office #13)

"You have to adjudicate on the information available to you; if you had more time and more resources you could probably collect more information, which may not lead to a different decision, but it might. You sometimes feel that there is more information out there which you just cannot get your hands on." (Adjudication Officer, Office #11)

On top of the difficulties with the evidence, there were also problematic phrases and words within the legislation, a few of which have been discussed in this section (for example, 'out of and in the course of...', and 'wholly or mainly in the vicinity of...'). The next section turns to medical decision-making, and highlights an additional range of problems for lay and medical staff alike.

### 3 - Decision-making in practice - the medical questions

Medical practitioners perform two distinct roles in relation to the two benefits under discussion in this chapter. Firstly, as adjudicating medical practitioners (AMPs), they decide the loss of faculty suffered by the claimant as a result of his or her accident or prescribed disease, and then quantify in a percentage figure the disablement that results. The final figure, which will determine the level of pension or size of gratuity payable, is arrived at by making a deduction (or 'offset') for any pre-existing conditions which affect the disability, and taking into account other, unrelated conditions which render the claimant more disabled than he would have been had he suffered the accident as a normal healthy person. This is work of a distinctly medico-legal nature, ie the decision criteria are statutory legal rules which draw simultaneously on the professional medical knowledge of the AMP. Secondly, they act as advisers on special hardship allowance claims where they will be asked for an opinion on whether a claimant's disability impairs the capacity to carry out paid work in either his or her regular, or some alternative, occupation.

In an advisory capacity on special hardship allowance, AMPs are merely asked to complete form BI 118 on which he must reply to a number of relatively straightforward questions about the claimant's ability to work. None of the 16 AMPs interviewed expressed any difficulty with this assessment. Most of them had been, or were, practising GPs and hence making judgements about people's ability to work formed a routine part of their work. As one remarked:

"It is usually fairly clear to a doctor whether someone is completely incapable of working. For the rest, there is normally something that they can do, so the answer to the question on the form about being capable of employment is usually 'yes'." (AMP, Region #2)

Another commented:

"It is very often a stupid question. There is virtually no-one who is not capable of some remunerative employment, especially as it is not part of our remit to consider the employment circumstances of that particular individual or the area in which he lives." (AMP, Region #1)

Deciding the medical questions on disablement benefit is very different, however. The time at which the fieldwork was undertaken was somewhat unusual, but particularly instructive for being so. If the research had been carried out some two years earlier this section would probably have recorded a similar problem-free picture that prevails in special hardship allowance decision-making, ie the procedure and method of assessment had been honed over the years to a fairly automatic action on the part of AMPs. The form that they were required to complete had been largely unchanged for many years, requiring them to record the relevant loss of faculty (ie the loss of faculty that resulted directly from the relevant accident or prescribed disease) and an assessment of the disablement suffered by the claimant.

However, it had come to the attention of the DHSS shortly before the commencement of the fieldwork that the process of making an assessment of disablement was at fault, since at no point on the BI 118 medical report form was there any connection made between the the relevant loss of faculty and the disablement. Coincidentally, the DHSS solicitors had notified the Department that AMPs were also failing to take account of aspects of the claimant's physical condition that might result in a greater disablement being suffered as a result of the relevant loss of faculty than was produced by the relevant loss of faculty alone. These two developments prompted a reappraisal of disablement benefit adjudication and the implementation of a revised process which makes for greater demands on the legal element of the medico-legal practice of adjudication. The new procedure is designed to demonstrate clearly the connection between the claimant's injury, and his total disablement, taking into account



factors not directly concerned with an industrial injury or prescribed disease.

In the past it had been the practice of AMPs to make a record of the claimant's injury or injuries and to compare this with the prescribed list of assessments in schedule 2 of the Social Security (General Benefit) Regulations 1982 (SI 1982/1408). For the most part, making a percentage assessment was considered to be fairly straightforward.

"After thirty years you have a pretty good built-in computer telling you what assessments should be. Occasionally, though, you get the one where it does not seem to fit immediately into your previous pattern of assessments."  
(AMP, Region #2)

The only conditions that were mentioned as causing any regular difficulty were back injuries, and the types of head injury that resulted in psychological damage to the claimant.

"The most difficult to assess, even after years of experience, are head injuries, by which I mean the resulting psychological effects. In fact any injury affecting the nervous system can be hard." (AMP, Region #3)

"The most difficult to assess are low back pain, but this applies equally to the out-patient clinic as the medical boarding centre, ie having to decide how much is true pathology and how much is overreaction by the claimant. Also head injuries, complaining of post-concussion syndrome, headaches, forgetfulness, that sort of thing; you cannot put your finger on anything." (AMP, Region #2)

The element of legal decision-making was therefore minimal; making a clinical judgement was followed in most cases by a fairly mechanistic comparison with a table of prescribed percentage assessments. And if this assessment had been affected by a condition either before or after the accident or onset of the prescribed condition then an 'offset' was made, ie a deduction of the appropriate percentage. This contrasts starkly with the new requirements which, at the time the fieldwork was being carried out, were not yet fully implemented,



although all the AMPs interviewed had experienced the changes in training sessions and trials of a new BI 118 medical report form.

Paragraph 1 of schedule 8 to the 1975 Social Security Act requires that:

"the extent of the disablement should be assessed, by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty..."

A close reading of this sentence reveals that there are at least three elements, forming a logical progression, (or four in the case of accidents) to making a percentage assessment of disablement. Firstly, there must be a relevant loss of faculty (and for accidents an identifiable injury to cause it) which must cause a disability or disabilities, which in turn results in a disablement. A DHSS training handout explains the distinction between these terms as follows: (30)

"Loss of faculty - this is something which the Act envisages as resulting from the injury and from which in turn, there results some disability. It may perhaps be best described as a loss of power or function of an organ of the body. Loss of faculty includes disfigurement. It is not in itself a disability but it is a cause, actual or potential, of one or more disabilities..."

Relevant loss of faculty - This means the loss of faculty resulting from the relevant injury.

Disability - this means the inability, total or partial, to perform a normal bodily or mental process equally well as a person of the same age and sex whose physical condition is normal... The availability of artificial aids should be taken into account in considering whether and for how long the loss of faculty would result in disability.

Disablement - this is the overall effect of the relevant disabilities, ie the overall inability to perform the normal activities of life - the loss of health, strength and power to enjoy a normal life."

Many AMPs considered the new requirements an unnecessary and wasteful exercise at the end of which they would be making the same assessment as before. Some found the distinctions between 'disability' and 'disablement' either particularly difficult to grasp or just troublesome:

"The new BI 118 forms are terrible, very difficult. All they seem to do is split hairs. I don't think they will affect my assessments though." (AMP, Region #1)

"I hate the new forms. It's really a nonsense to try to distinguish between relevant loss of faculty, disablement and disability." (AMP, Region #3)

This hostility was not universal however:

"The new form is particularly clear if you follow it through, it is very logical; although I didn't think that when I first saw one." (AMP, Region #1)

One Regional Medical Officer reported that a number of 'old-timers', who had been making disablement benefit assessments since the 1950s or even earlier, had decided to retire rather than grapple with the changes (he seemed not too displeased by this outcome). One younger AMP was more stoical though perhaps a little cynical,

"You have to become a master of the synonym when you are asked the same thing two or three times, but we will get used to it in time." (AMP, Region #2)

The other change that has been incorporated into the revised BI 118 is a more rigorous approach to the claimant's other conditions which affect his or her disablement. There are three types, called, in the jargon of medical adjudication, 'O (pre)', 'O (post)', and 'C'. 'O (pre)' conditions are those that, as well as the relevant loss of faculty, are another effective cause of the recorded disability. If such a condition is present its contribution to the total percentage disablement must be assessed and deducted from the final assessment. If the condition arose after the accident, it is recorded as an 'O (post)' condition and its contribution to disablement assessed as for

'O (pre)' conditions (it may make no difference to disablement in which case no offset is made). The 'C' conditions are those which are not effective causes of the disability but which produce disabilities quite distinct and separate from those arising from an accident. However, the disability that 'C' conditions produce may interact with the relevant disability to make it even more disabling than it would otherwise have been. Examples might be the loss, due to damage to the nerves of the forearm, of sensation in the fingers of a blind man who as a result could not read Braille. Or deafness in a blind person who would have relied on his hearing to warn him of dangers such as approaching traffic.

The new arrangements will clearly make greater demands on AMPs to have regard to the legal content and impact of their deliberations. Previously not much thought would even have been given to loss of faculty; an injury would merely have been noted and a percentage figure attached and any offsets deducted. The problem was stated by one Regional Office Medical Officer:

"Whether there has been any 'loss of faculty' means nothing in medical terms; it is a legal term, and doctors do not very often think legally." (Medical Officer, Region #2)

His view would seem to be shared by some of the AMPs themselves:

"I don't feel as though I'm doing anything particularly legal in nature. I don't know enough about the law to feel like a lawyer." (AMP, Region #3)

If AMPs are to fulfil the task of medical adjudication satisfactorily, however, the full legal significance of their deliberations should perhaps be made clear and unequivocal.

#### 4 - Organisational effects

The organisational environment within which adjudication officers and disablement benefit clerks must operate can clearly influence the practice of decision-making. The procedures for processing claims are clearly laid down in the Adjudication Procedure (AP) Code which is prepared by DHSS HQ and used in each local office. However, the deployment and arrangement of staff throughout the office and within the CB side depend more on local demands and pressures. This section analyses some of the main pressures on the adjudication officer which derive from the organisational environment (rather than, say, the details of the legislation or from the claimants themselves). As noted earlier, within the London South Region, disablement benefit adjudication is semi-centralised in only three Benefit Offices (BOs) rather than incorporated into the work of an integrated local office (ILO).

##### (a) The view from the top

For managers of local offices disablement benefit is something of a backwater. They are usually more concerned with the administration of supplementary benefit since, for most claimants, the benefit is their principal source of income. This is reflected in how managers view their role:

"I would say that what is expected of us is to get the payments out and clear the callers; as accurately as possible obviously." (Manager, Office #9)

"In general terms our objective is to pay claimants the right amount of benefit to which they are entitled; to pay it promptly and accurately." (Manager, Office #12)

This general approach was echoed by the CB HEOs whose responsibilities within the local office include the administration of retirement pensions and sickness benefits which again may form the core of a claimant's income.

"My job, as I see it, is to make sure that people get their money on time; getting money out accurately and quickly - that's it." (HEO, Office #8)

"The main goal has got to be to pay state benefits correctly and on time. I don't think the claimants are interested in anything other than that. They expect us to pay them what they are entitled to, all they are entitled to, when they are entitled to it - and that has got to be the ultimate aim of the office." (HEO, Office #2)

The similar responses of managers and HEOs display a clear commitment to disbursing benefits quickly and accurately. The burden of accomplishing this objective, however, falls on the front-line staff.

**(b) The effect at the bottom**

The concern of managers and HEOs with speed of throughput was felt by the adjudication officers, although in the administration of disablement benefit they did not always agree that it should be their priority also. The main reason for this was that the benefit was rarely seen to be a claimant's sole source of income, and hence they considered it justifiable to spend longer collecting as much of the required information as possible in order to reach a correct decision. The pressure for a fast throughput remained, however, the most important influence on the quality of decision-making.

"This Department seems to want quantity and quality and I do not think it's possible to get both, so somewhere along the line you've got to compromise one or the other or both. I think it tends to be possibly both. You don't always have the time to devote to the more involved cases." (Adjudication Officer, Office #13)

"Your HEO expects you not to have any delay on cases or have many appeals - get things done as quickly as possible and as thoroughly as possible, because he will carry the can as well as you if things aren't up to scratch." (Adjudication Officer, Office #3)

Responses often revealed the existence of a potential conflict between speed of decision-making and accuracy, although this was felt less in

the London South offices. Whilst it was generally recognised that these were both legitimate objectives there was no general agreement about which should prevail.

"...accuracy comes first, if you are making an award either on disablement benefit or SHA then a lot of money is involved and so it is always uppermost in my mind that it has got to be accurate." (Adjudication Officer, Office #11)

"I've always gone for the quantity, basing that on the safeguard that you always try to ensure that the major points of any case are covered. I've always tried to take the approach that if we can get a claimant a giro, providing that we do all we can to ensure that it is the correct amount paid at the correct time, then we are reasonably discharging our responsibility to the claimants." (Adjudication Officer, Office #13)

"... you try for the best quality you can but quantity has to come first... I think the percentage of errors is a lot higher than it used to be purely because of the amount of work." (Adjudication Officer, Office #7)

The intrusion of errors was not the only reason cited for the loss of accuracy; some adjudication officers felt that the quality of the evidence on which they had to adjudicate could also be adversely affected; as one adjudication officer commented:

"I would say that quality is more important to me than quantity, definitely, but whether you can always give it that priority when quantity is a desired management pressure, I wouldn't like to say. Probably, though, quality would suffer a little bit." (Adjudication Officer, Office #9)

The pressure to maintain a fast throughput of cases is an important influence on the approach of adjudication officers to information collection. However, there were additional pressures on the adjudication officer in offices where the post included supervisory responsibilities



(c) Supervisory adjudication officer or adjudicatory supervisor?

A recent organisational change within the CB side of the local office has been to incorporate the roles of adjudication officer and supervisor which had previously been kept separate. The reasons for this change are primarily organisational. The amount of adjudication work in local offices had fallen with the introduction of statutory sick pay (and the concomitant restriction in the scope of sickness benefit) and in many offices there was not sufficient adjudication work left to justify a full-time adjudication officer. But the two roles are not particularly easy bedfellows since they require different skills and attributes which a single person cannot always supply.

"... because of the nature of the work you must have patience, the ability to weigh things up and be unbiased, and a tenacity to follow a case through fully. For a supervisor, however, you need to get on with people, to be able to motivate them - and lots of people cannot do it." (HEO, Office #5)

Apart from the personal qualities needed for both roles, there was also an inherent clash between the type of work that each generated:

"... for adjudication you need a bit of peace and quiet, there is nothing worse than trying to write an appeal or do a difficult decision when there are people coming to you all the time wanting girocheques authorised, or advice on a phone call, or a counter query. They are definitely two different types of jobs; they don't mix well." (Adjudication Officer, Office #2)

Very few adjudication officers felt that both roles could be carried out satisfactorily at the same time, and that as a consequence both suffered, although opinions were mixed on which fared the worse.

"I don't think it is an ideal situation by any means and I don't really like it. As a section supervisor trying to adjudicate you've got to contend with a lot of noise, constant interruptions, and you are continually changing between supervisory work and adjudication." (ex-Adjudication Officer, Office #9)



"There have been some occasions when I've sent a decision to the typists and when it has come back I've thought 'what the hell did I do that for?' It may be something simple like a wrong date which is purely because you have been interrupted and your train of thought has been broken." (Adjudication Officer, Office #2)

"I don't spend enough time on supervision because I don't have enough time to deal with seven clerical officers and a medical boarding clerk. Because of the volume of work and the need to get adjudication right there isn't the time to do the supervision work." (Adjudication Officer, Office #7)

Like the pressure of having to process claims quickly, one of the results of combining supervisory and adjudication work was to force adjudication officers to curtail enquiries earlier than they would have liked in order to make a decision. Again it is the information collection stage of the decision-making process which is compromised.

#### **(d) Disablement benefit as poor relation**

Although the experience of this study has generally been to the contrary, it was admitted on more than one occasion that disablement benefit, as something of a backwater amongst benefits, was not often allocated the more proficient of the staff in the local office. Indeed the tendency was rather to use disablement benefit as something of a dumping ground, when necessary, especially for clerical staff who could not perhaps cope with the tougher pressures generated by short-term benefits (particularly sickness benefit) but could be trusted with the more sedate pace of disablement benefit.

"Disablement benefit needs serious-minded staff and there are LOIs on sickness benefit who I wouldn't put on it. On the other hand I put my better LOIs on short-term benefits. A lot of my disablement benefit clerks don't cope as well with the pressures of short-term benefits but do a very adequate job on disablement benefit." (Manager, Office #8)

The impression gained in the local offices visited more than bears out this manager's final comment.

(e) Experience versus career development

Another recent organisational trend has been to include the new adjudication officer/supervisor role in the normal career development of staff on the Executive Officer grade. The reasons for this, as explained by one manager, were mainly that promotion prospects within the DHSS were not particularly good for EOs and that hence civil service promotion boards were demanding that applicants to the HEO grade demonstrate wide experience of social security administration. And since an HEO post is primarily managerial, management experience at EO level was now virtually sine qua non. So, remaining in a predominately adjudicatory post for much more than 2 or 2½ years was seen as potentially detrimental to an official's career. A common policy within the local office was therefore to appoint adjudication officers for no longer than this before transferring them to other duties, despite the acknowledgement that to become fully effective takes in the order of twelve months (in most adjudication officers' estimate) and that experience was invaluable.

"It's amazing how you become used to the adjudication process once you actually start; it does begin to grow on you. I'm certainly making better decisions than a year ago; experience is the best teacher." (Adjudication Officer, Office #5)

This brief survey of the pressures on adjudication officers reveals that the inherent difficulties in decision-making (of collecting information and applying the legislation) can be compounded and exacerbated by a range of factors stemming from the organisational environment in which the adjudication officer works. How important it is to negate these pressures will be revealed by the extent to which they affect the satisfaction of the accuracy and fairness demands of administrative justice. Part III attempts such an assessment.

### Part III - THE DEMANDS OF ADMINISTRATIVE JUSTICE

#### 1 - Administrative Justice and Lay Adjudication

##### (a) Accuracy

##### The Official View

The official monitoring system of the DHSS, carried out on behalf of the CAO is still in its relative infancy. When the fieldwork was being carried out in early and mid-1986 one of the offices visited had not yet received a visit from either a Southampton or a Regional monitoring team. For the other twelve offices, it was possible to obtain copies of the latest reports, which this section draws upon.

In addition, it is possible to give a national picture of the standards of adjudication from the first two annual reports of the CAO (DHSS, 1985e and 1986c). Each report includes, inter alia, an analysis of the 'adjudication comments' raised on industrial disablement benefit and special hardship allowance. However, there are important differences between the two reports. Both include an analysis of industrial accident and SHA decisions, but decisions on prescribed diseases cases are only analysed in the earlier report, and on industrial disablement benefit itself only in the latter. Also, the category of 'decision not justified on the evidence' under the reasons for comment has been divided into two categories in the 1985/86 report, viz. 'sufficient evidence but wrong finding of fact' and 'incorrect law applied or law applied incorrectly'. Tables 5.5 and 5.6 reproduce the relevant extracts. (31)

TABLE 5.5 - OCAO analysis of industrial injuries decisions, 1984/85

	Industrial accidents	SHA	Prescribed diseases
number of decisions examined	1138	664	183
Question for adjudication officer not decided	0	1	2
Insufficient evidence on which to decide	40	31	9
Decision not justified on the evidence	3	43	1
Record of decision inaccurate	4	7	23
Other reasons	0	4	1
<b>TOTALS</b>	<b>47</b>	<b>86</b>	<b>36</b>
Comments per 100 decisions examined <sup>(a)</sup>	4	13	20

Source: First Annual Report of the CAO (DHSS, 1985e, p.68)

(a) this is not strictly a percentage error rate since more than one comment can be raised on a single case

TABLE 5.6 - OCAO analysis of industrial injuries decisions, 1985/86

	Industrial accidents	SHA	Disablement benefit
number of decisions examined	887	354	261
Question for adjudication officer not decided	11	2	1
Insufficient evidence on which to decide	27	34	5
Sufficient evidence but wrong finding of fact	4	22	4
Incorrect law or law applied incorrectly	6	34	13
Record of decision inaccurate	3	21	19
Other reasons	4	17	3
<b>TOTALS</b>	<b>55</b>	<b>130</b>	<b>45</b>
Comments per 100 decisions examined <sup>(a)</sup>	6	37	17

Source: Second Annual Report of the CAO (DHSS, 1986c, p.84)

(a) this is not strictly a percentage error rate since more than one comment can be raised on a single case

A 'record of decision inaccurate' comment is raised when the adjudication officer fails either to record the correct coding of the decision in the casepapers, or to use the correct 'model decision'. As such, errors under this heading cannot necessarily be considered to be 'inaccurate' in the sense that they offend against Mashaw's definition of accuracy, ie,

"... the correspondence of the substantive outcome of an adjudication with the true facts of the claimant's situation and with an appropriate application of the relevant legal rules to those facts." (1974, p.774)

Rather, such errors can be viewed as technical deficiencies<sup>(32)</sup> in the adjudication process. The figures in tables 5.5 and 5.6 for 'comments per 100 decisions' would more appropriately reflect Mashaw's notion of accuracy if comments for 'record of decision inaccurate' were omitted. The revised figures would therefore be as follows.

TABLE 5.7 - Analysis of comments raised on industrial injuries decisions (excluding 'technical deficiencies'), 1984/5 and 1985/6

	<u>Industrial accidents</u>		<u>SHA</u>		<u>P.d.s</u>	<u>Dis. Ben.</u>
	84/5	85/6	84/5	85/6	84/5	85/6
number of decisions examined	1138	887	664	354	183	261
Total comments	43	52	79	109	13	26
Comments per 100 decisions	4	6	12	31	7	10
(Comments per 100 decisions from Tables 5.5 and 5.6)	(4)	(6)	(13)	(37)	(20)	(17)

For industrial accidents the picture presented has deteriorated slightly but remains good whichever way it is viewed (industrial accident adjudication is even singled out in the CAO's first report as one of the "better areas of adjudication" (DHSS, 1985e, para.29,

p.51)). On prescribed diseases the bulk of the comments are due to an 'inaccurate record of the decision'. As table 5.7 shows, when the comments of substance are considered alone, only 13 comments (and not 36) would have been registered, and a comment rate of around 7 per 100 would have resulted, a far healthier picture than the 20 per 100 that table 5.5 suggests. So, prescribed diseases decision-making can also be considered to be in a satisfactory state. Special hardship allowance decision-making is more worrying; in 1984/85 nearly all the comments (74 of 86) were due to problems in the evidence and exactly half were raised because the adjudication officer's decision was not justified on the evidence, arguably the most serious category. Whilst 74 comments of substance only translates into a comment rate of 12 per 100 for that year, the second CAO report present a marked deterioration. Even when 'technical deficiencies' are excluded nearly one third of all SHA decisions were faulty. The first verdict on industrial disablement benefit decision-making (in the report for 1985/86) is also a cause for concern. Although the comments of substance only related to 10 out of 100 cases, exactly half of these (13 out of 26) related to a faulty application of the decision criteria, which contrasts with the predominance of evidential problems on industrial accidents and SHA. The verdict that seems to emerge from the CAO's report might be 'very good' for industrial accidents and prescribed diseases, 'passable' for industrial disablement benefit, and 'worrying' for special hardship allowance.

Table 5.8 gives an analysis, similar to that in tables 5.5 and 5.6 above, of the comments raised by the Regional monitoring teams on industrial accidents and disablement benefit decisions for the offices visited in this study. The total figures have been broken down to show the differences between the London South Region (L(S) in Table 5.8), which has the three centralised offices and the Scotland and North East (S/NE) Regions where adjudication on industrial injuries is carried out in integrated local offices.

TABLE 5.8 - Analysis of industrial accidents, disablement benefit, and special hardship allowance in local offices

	<u>accidents</u>			<u>disablement benefit</u>			<u>SHA</u>		
	S/NE	L(S)	TOT	S/NE	L(S)	TOT	S/NE	L(S)	TOT
decisions examined	14	35	49	16	37	53	8	42	50
Question for adjudication officer not decided	-	-	-	2	-	2	-	-	-
Insufficient evidence on which to decide	5	-	5	2	-	2	3	2	5
Sufficient evidence but applied incorrectly	1	-	1	2	-	2	-	5	5
Incorrect law applied or law applied incorrectly	-	-	-	2	-	2	-	-	-
Record of decision incomplete or inaccurate	-	-	-	3	-	3	1	-	1
Other	-	-	-	1	-	1	2	-	2
<b>TOTALS</b>	<b>6</b>	<b>-</b>	<b>6</b>	<b>12</b>	<b>-</b>	<b>12</b>	<b>6</b>	<b>7</b>	<b>13</b>
comment rate/100 decisions	17	0	12	75	0	23	26	17	75

Source: compiled from monitoring reports from each office (1986)

TABLE 5.9 - Summary of table 5.8

	questions considered	comments	comment rate per 100 decisions
London South	93	7	8
Scotland & NE	59	24	40
<b>TOTAL</b>	<b>152</b>	<b>31</b>	<b>20</b>

Tables 5.5 to 5.9 prompt several observations and raise some questions. Firstly, the overall comment rates for industrial



accidents and special hardship allowance are somewhat higher than in the CAO reports<sup>(33)</sup> but this hides the starkly different picture presented by London South in comparison with the other regions; on accidents London South scored zero, and Scotland and the North East 17, whilst the corresponding figures for special hardship allowance are 17 and 75 respectively. The disablement benefit rates were even further apart at 0 and 75 respectively. That the large (in terms of workload) offices perform better is clear, and the hypothesis suggests itself that offices with bigger caseloads generally perform better. In order to test this further, firstly, the comment rate for each office was calculated from the monitoring reports, and the offices ranked in order of proficiency. Secondly the offices were ranked in order of workload (as calculated for table 5.4). A rank coefficient correlation test was then performed. The results of this exercise are as follows:

TABLE 5.10 - Local office workloads and comment rates<sup>(a)</sup>

	<u>Workload</u>		<u>Comment rates</u>			
	cases	rank	questions	comments	rate	rank
Cowdenbeath	561	7	28	2	7.1	3
Edinburgh (N)	155	11	21	8	38.1	11
Glasgow (City)	57	12	27	9	33.3	9
Perth	179	10	27	7	25.9	7
Dewsbury	459	8	16	4	25.0	6
Doncaster (W)	1621	4	30	5	16.7	5
Rotherham (S)	1294	5	25	7	28.0	8
WallSEND	356	9	16	9	56.3	12
York	584	6	16	6	37.5	10
Aldershot	4175	1	46	4	8.7	4
Broadstairs	3291	2	46	3	6.5	2
Hastings	2172	3	45	2	4.4	1

(a) a report for Dundee (East) was not available for this analysis

The rank correlation coefficient calculated<sup>(34)</sup> was 0.7 showing a strong correlation between size of workload and standards of

adjudication. Although the calculation is based on a small number of pairs (12) the result is sufficiently high to add support to the hypothesis that bigger caseloads promote greater accuracy.

Since there have been only two CAO reports and each office had received at most only one visit from a Regional monitoring team a comparison over time is difficult. Nevertheless, what evidence there is, supported by the general view at all levels of the DHSS, suggests that standards are declining. This was implicit in the comments of adjudication officers concerning current difficulties of adjudicating under the pressures of high workloads and supervisory demands, and more explicitly stated by members of the monitoring teams:

"Standards are falling. Adjudication is a quiet, contemplative, considerative activity, but with the increases in workload, not of adjudication but of supervision, there is a loss of expertise coupled with less time for the job. Plus, there has been a cascade of altered regulations and instructions; everything is so fine-tuned that you've only to have a Commissioner sneeze and the effect is widespread." (Monitoring team member, Region #3)

That accuracy has been demonstrably falling must be a major concern of those interested in the promotion of administrative justice. However, we need to question whether the picture is quite as bad as that suggested by the results from the monitoring system. This requires a consideration of how accuracy is defined.

#### The problem of defining accuracy

As mentioned in the section on decision-making in practice, the main difficulties for adjudication officers are concerned not with the interpretation of the law (though these do arise occasionally), but with the evidence, particularly when it is incomplete, unsupported or contradictory in some way. In most cases problems do not occur, but when they do there is a burden on adjudication officers to be as rigorous in their pursuit of the 'true facts' as possible since their

decisions will either commit often very large sums of public money, or alternatively deny claimants compensation for an injury or illness which may make a considerable difference to their standards of living, possibly for life.

The fundamental task for the adjudication officer, therefore, is to establish, in Mashaw's words, 'the true facts of the claimant's situation'. For a decision to be considered accurate the true facts must be established and then the law must be applied correctly. The figures in the CAO's report for 'insufficient evidence ... etc' are perhaps reassuring for the most part (although not so much for special hardship allowance) but doubt is cast upon them by table 5.8 compiled from Regional monitoring teams reports. The comments of adjudication officers quoted earlier regarding the necessity to decide cases on less than adequate information is another indicator of the difficulty of establishing the 'true facts'. And further concern is raised by implication in the responses of some adjudication officers when asked how they dealt with complaints from claimants about their decisions, and letters of appeal.

"Sometimes when you are preparing an appeal, your decision, which may have seemed sound at the time, you might begin to wonder at, quite often because they have given some information in the appeal that they didn't think to tell you at the appropriate time, which may have made all the difference." (Adjudication Officer, Office #7)

Similarly, new evidence may emerge at an appeal hearing itself, despite the earlier efforts of the adjudication officer:

"Sometimes on special hardship allowance new earnings information is put forward. I remember a case where I had checked earnings thoroughly, and even sent an inspector to the man's work but still new information appeared later." (Adjudication Officer, Office #3)

When there is doubt remaining over the true facts of the case, or the adjudication officer decides to curtail enquiries, then he is left with having to decide the case on what evidence is available. In this he must accept what 'on the balance of probabilities' <sup>(35)</sup> would be the case, but how he perceives this balance will depend on what weight he attaches to each piece of the evidence. At the end of the process it is quite possible that an adjudication officer will decide one way whilst on another occasion he might decide differently, but both would be 'correct'.

Despite the difficulties of defining accuracy, elements of the organisation are designed to promote it. How they do this and how well they do will be discussed in the following sections on training, the advice network, the monitoring arrangements, and the tribunal system.

### Training

The experience of training amongst the adjudication officers interviewed varied widely, mainly as a function of how long they had been carrying out adjudication duties; the more venerable of the respondents could barely remember what training they had received initially, whilst for the newer recruits their recent training remained fresh in the memory.

The training received by new adjudication officers in 1986 would follow one of two patterns, both of which had a large common element. For adjudication officers who had been promoted from the clerical grades (ie below Executive Officer grade), basic training would have been carried out probably several years earlier within the office and would have comprised work on self-instruction packages <sup>(36)</sup> and spending time with an experienced adjudication officer. The time spent on these activities was not fixed but typically lasted for about four weeks, depending on the exigencies of the office (one

adjudication officer had only one week 'sitting in' before she was unavoidably, due to sickness, thrust into the role of adjudication officer for long term benefits). For the direct entrant to the Civil Service EO grade there was a formal, structured 19 weeks training (the first 13 of which were the same as for new clerical officers) after which they could be expected to assume any EO job within the office (ie adjudication officer, supervisor, or inspector). The common element to training takes place after the adjudication officer had some direct experience of adjudication work. This is the Initial Adjudication Course (IAC) undertaken at one of the DHSS's Training Centres around the country. The 'lead' centre is Nottingham where staff are responsible for preparing the course material for the other centres.

The content of the IAC is, as it is intended to be, basic. The main objective is to teach the technique of adjudication rather than the detailed content of social security legislation. The first part of the course therefore tackles what adjudication is and how it should be approached. Trainees are taught that there are three stages to adjudication: examining the evidence, establishing the facts, and applying the law to the facts. (37)

Trainees were given guided tours of the Brown Books (bound volumes of all current statute law), the Insurance Officer's Guide, and Neligan's Digest of Commissioners' Decisions. Training sessions alternated between talks from training officers and practical exercises, later sessions being devoted to common adjudication problems, such as reviewing decisions, and deciding late claims and overpayment cases. A final optional session dealt with industrial accidents. Throughout, the independence of the adjudication officer was emphasised and the essentially individual character of decision-making acknowledged. If two adjudication officers reached opposite conclusions in the practice exercises neither was criticised for being wrong; rather it was pointed out that it was to be expected that adjudication officers

giving different weights to the evidence may arrive at different definitions of the facts of a case and hence differing decisions when the law was applied.

The ethos of the training was very much to inculcate the right approach to adjudication in new adjudication officers. As the head of the Nottingham Training Centre explained:

"Our objectives are to impart a certain amount of knowledge, but more to show the trainees how to adjudicate, such that even when the law has been changed they can adapt themselves whilst using the same basic principles and techniques. Admittedly, we are not dealing with the practical problems of being an adjudication officer/supervisor in the local office environment, such as time pressure in particular."

Adjudication officers in local offices who had had recent experience of this style of training were generally at least satisfied with it or even more complimentary; none was condemnatory:

"... the course was very good. Overall I think I have been adequately trained, but we don't get enough training on changes that come in." (Adjudication Officer, Office #7)

"... the initial course was the best training course I've ever been on. But most of what I've learned has been from others in the office." (Adjudication Officer, Office #12)

The consensus amongst a small sample of adjudication officers taking part in the IAC was favourable. Criticisms ranged from the timing of the course, ie it should come much earlier in the adjudication officer's career (and preferably right at the start), and the lack of attention given to the problems for adjudication caused by workload and organisational pressures. Perceived weaknesses in the overall training system included the ad hoc arrangements for keeping adjudication officers abreast of developments and the reliance that this places on the HEO in the local office who may not be as au fait with adjudication as his adjudication officers.



### Advice

The policy of 'devolution' within the DHSS (ie pushing responsibilities down to local level to counteract the bureaucratic tendency of decisions 'floating up' the organisation), coupled with the inception of the OCAO with its prevailing philosophy of independent adjudication, have had a marked effect on the structure and practice of giving advice to adjudication officers. In essence, the current formal arrangements are administered under the auspices of the OCAO and comprise the Insurance Officers' Guide as the initial source of general advice, the HEO/AO to advise on specific difficulties, and finally, where these fail to resolve a specific problem, Southampton itself. Previously, each Regional office had its own team of advisers with the RAO (or RIO as it was previously called) section who performed the role that HEOs are now expected to undertake. Running parallel to this formal structure, adjudication officers adopt a variety of informal techniques to secure advice on difficult cases.

For virtually all adjudication officers, faced with a difficult case, the first source of assistance tried was the IOG. As its name implies it is a guide on the interpretation of statute and case-law. It is prepared and kept up-to-date by OCAO, although in practice its status with adjudication officers varied. For some it was treated almost as a code of instructions (such as the Adjudication Procedure code which deals with the physical processing of benefits) whilst others appear to have a somewhat cavalier approach to it.

"For me it is very powerful; I wouldn't ordinarily, or even ever, go against the advice in IOG." (Adjudication Officer, Office #11)

"You tend to follow it as much as you can; it is very helpful and one of the better codes..." (Adjudication Officer, Office #12)

"Sometimes you might conveniently forget to look at a certain paragraph that doesn't suit you; the IOG sometimes makes things unnecessarily complicated." (Adjudication Officer, Office #8)



"As one of our Senior Medical Officers once said 'if you can't live with the answer don't ask the question'. I suppose I must have conveniently forgotten the IOG advice on some occasions." (Adjudication Officer, Office #4)

Although HEOs were the next formal tier of advice, adjudication officers frequently ignored them.

"It's difficult to go to an HEO for advice when they haven't had as much experience as you have. We tend to ask each other rather than go to the HEO, which I suppose we shouldn't but it is our habit." (Adjudication Officer, Office #12)

So, if difficulties with a case were not resolved by the IOG, adjudication officers tended to consult colleagues from within their office (either practising or former adjudication officers), or from another office, or occasionally from the Regional Office where the reduced RAO section might still house officers who had previously been engaged as advisers.

"... after having discussed such a case with the other AOs I would probably go through the formal channels, but it is rare that I do that. The HEO has only been here six months and so that is why I'm probably reluctant to refer things to her." (Adjudication Officer, Office #11)

Where the HEO had been an experienced adjudication officer, and particularly with disablement benefit, the adjudication officer, as customer, was far more satisfied. Whilst the use of colleagues' experience was a natural and officially tolerated practice, the continued unofficial use of RAO personnel was not viewed so favourably (or at least was not meant to be). The use of RAO by adjudication officers depended very much on how requests for help were received by the Regional office staff. The loss of the Regional advice function was not a particularly popular policy decision with the Regions and there was still an undercurrent of feeling that it should be reinstated. To this effect some RAO officers quietly welcomed the

occasional enquiry, a situation which in more than one Regional Office was condoned by the Principal Adjudication Officer himself. As one RAO officer explained:

"I would say that we still get enquiries from over half the local offices in this Region, but only via phone calls. So, we still give advice as we used to ... it's all known by the higher-ups." (RAO officer, Region #2)

The practice was far less common in London South where the concentration of adjudication officers in the three Benefit Offices maintained a sufficient fund of expertise which could be drawn upon to deal with most problems. But in other offices the loss of the RAO advice role was often missed, by adjudication officers and HEOs alike.

"Now you tend to make decisions yourself which I think is right, but if you do tend to go off on the wrong track through inexperience you might never find out, or at least not for a long time." (HEO, Office #8)

"RIO definitely did a good job. And I also believe that you can't beat the personal contact that you build up with a regional service." (ex-Adjudication Officer, Office #3)

In the spirit of making local offices more responsible for their decisions the initial advice that was disseminated from Southampton was that it was only the exceptional and difficult case that should be referred to them, and that, in such cases, a request for advice should be made in writing giving all the details of the case. The effect of such an edict was to isolate OCAO from the adjudication officer and to encourage the use of alternative sources of advice. The intention was to curtail what was seen as the previous misuse of RAO expertise by some adjudication officers who were prone to refer cases which they should have been able to resolve at the local level, but who preferred to transfer the burden of responsibility if they could. Many early experiences of using OCAO therefore were less than satisfactory. However, recent efforts had been made by OCAO staff, by encouraging the submission of more cases, to bridge the gap that such an approach created.

"They are quite helpful and have speeded up their delivery considerably; you do at least get the law in black and white." (Adjudication Officer, Office #12)

"They're usually pretty good. But it is one of the things about adjudication that nobody ever tells you the answer; they will argue the points for you and possibly advise you but it is always passed back to the individual because of our independence." (Adjudication Officer, Office #4)

Removing the RAO advice function may prove to have been short-sighted. The RAO sections had built up a fund of expertise through the regular submission of problem cases and frequent telephone enquiries; they were able to identify general areas of difficulty and pick out individual offices where adjudication might be weak. They were also a source of reassurance and confidence for the individual adjudication officer where they could confirm his feeling about a case or suggest looking in a particular section of the IOG.

"It was always reassuring to know that if there was a little problem - you might have made up your mind what to do but just needed a bit of confirmation - then you could pick up the phone and ask if they could help; and the answer was always yes." (Adjudication Officer, Office #10)

That standards of adjudication were generally seen to be falling was noted earlier. From the responses of the givers and receivers of advice within the decision-making system it is likely that poorer advice mechanisms are a contributory factor in this decline.

### Monitoring

The results of the monitoring system as an official measure of standards of adjudication have been presented earlier in this section. The other objective of the system, though, is to assist in maintaining and improving standards<sup>(38)</sup>.

The current monitoring arrangements are recent in origin, dating from 1984 and comprise the HEO/AO at the first level, and the OCAO and Regional monitoring teams at the second. The lynchpin of the monitoring system, like the advice arrangements, is the HEO/AO, whose weekly and monthly checks are intended to identify problems quickly so that action to remedy them can be taken immediately. The Regional monitoring teams, in contrast, will only visit an office every two years (although there are arrangements for a more frequent return visit to an office considered to be unsatisfactory). The comparative importance of the HEO and the Regional monitoring team was noted by one Regional Office employee:

"Standards depend a lot on the HEOs; where there has been time for them to gain expertise or where the HEO himself has a background as adjudication officer, that certainly seems to show in the performance of their own adjudication officers. The HEO can spot weaknesses and sort them out without waiting for us to descend." (RAO Officer, Region #1)

Regional teams are required to submit a copy of their report to Southampton to assist the CAO in preparing his annual report, and hence use a standard format for their reports. However, they have also developed slightly different techniques in order to provide as much assistance to local offices as they can without transgressing the boundaries of 'advice' or 'training' which lie outwith their legitimate educative role. The monitoring teams in two of the Regions give the offices an overall assessment of either very good, good, fair, or unsatisfactory. In the other Region a satisfactory/unsatisfactory grading was given on each element of the work assessed

(for example, appeals preparation, pensions decision-making, accident decisions, etc). Each team, having completed its report, held a meeting or meetings with local office staff and management to discuss its contents and any further action that might be taken. In two Regions the monitoring team checks were conducted by calling cases in to the Regional Office, whereas in the other Region it was felt important that the local office staff had as much access to Regional officials as possible in order to build some kind of rapport between them and to enhance their educative function. Hence, a monitoring team would be present in a local office for two weeks whilst the checks were carried out.

As explained earlier, minor technical deficiencies are recorded as 'comments' as well as more substantive shortcomings. A frequent criticism of the Regional monitoring teams, therefore, was that they indulged in 'nit-picking', a term which recurred in offices throughout the country with remarkable regularity.

"This last visit was aggravating because they really did nit-pick on the most tiny points that nothing really useful came out of it. I think they were just justifying their existence." (Adjudication Officer, Office #8)

"We have just had a visit and we thought that they were a little bit hard, a little bit nit-picking; it is all very well being able to sit down with half a dozen cases and find mistakes, but when you are trying to do them when the phones are ringing and you're surrounded by five or six staff it's not so easy." (Adjudication Officer, Office #10)

As with advice-giving it was important for adjudication officers to feel confident that the monitoring team members were competent to carry out their task; if they felt better qualified than the monitors then it became difficult for adjudication officers to respect the advice given. This was a criticism that also applied to the HEO on occasions.

"The trouble with having a lot of experience of adjudication is that the people who come from Region haven't got the

depth of background that I have which may make them a little reluctant to criticise me, and certainly gets me huffy when they do. But the flaw in the system is monitoring by the local HEO/AO who is even less experienced." (Adjudication Officer, Office #12)

The loss of the advice function was seen as contributing to the reduction of the expertise of the monitoring teams.

"Their problem is that they are losing touch with day-to-day things now that no cases are put to them for advice. Looking at more cases might help." (Adjudication Officer, Office #6)

Irritation also arose from the narrow approach to adjudication taken by the teams, which ignored other pressures on adjudication officers.

"You may spend what you consider to be enough time on a case to come to a well-reasoned decision but RAO will come along and say you should have made more enquiries; even though you might have come to the same decision, at least you would have had more to back it up; but you have got to find a cut-off point. This is probably the cause of any conflict between RAO and the local office, we just don't have the time to carry it through as far as they think we ought to." (Adjudication Officer, Office #7)

Despite these criticisms, monitoring per se was considered to be a justified and potentially worthwhile exercise, particularly for newer staff rather than the old hands.

"We are monitored closely throughout the process and I think that that is right, after all you can't rely on claimants appealing to point out bad decision-making, they have the right of appeal but they won't always exercise it." (Adjudication Officer, Office #13)

"After a change in the office, like an influx of new adjudication officers, things begin to slide a little bit or you may be following a procedure that is not strictly correct and they will put you straight." (Adjudication Officer, Office #4)



Overall though, the influence of the monitoring system was not perceived to be very great. This was principally due to the long periods between visits combined with the present practice of moving staff around the office at roughly the same intervals. One adjudication officer summed up the problem thus:

"Suppose you have a new adjudication officer on disablement benefit, by the time they see any of his work he may well have got into bad habits or misunderstood something important, so that for the first however many months he may be doing something daft. You may reply that there is also HEO monitoring within the office but he may be new as well. And with the number of decisions that are made in two years combined with the small percentage that the monitoring teams check I really don't see how they can expect to get any realistic idea of how good, bad or indifferent you are." (Adjudication Officer, Office #5)

The problem was recognised at Regional level also:

"I would have to say that overall I don't think we are making much of a contribution to improving standards. Not because of any deficiencies on the part of the staff here, but because the current arrangements of visiting every two years for a short time mean that we can do little to influence adjudication standards. The best we can hope for is to impart to the HEO the things he should be looking for in his regular monitoring, and hope he carries forward the message." (Monitoring team member, Region #3)

The monitoring system, therefore, seems unable to fulfil its admittedly secondary role of helping to maintain and improve standards of adjudication. Its primary function of providing an assessment of adjudication standards does seem to be satisfied but, for the local office, it can only provide a 'snapshot' assessment; if a monitoring team had visited six months earlier or later it could well have recorded a different picture since standards inevitably tend to follow a cyclical pattern of improvement and decline as adjudication officers gain in expertise only to be replaced by comparatively raw recruits.



### Social Security Appeal Tribunals

The positive contribution of the social security appeal structure to the achievement of accuracy is twofold. Firstly, there is the direct effect of the SSAT altering a decision that it finds was incorrect in some way. Secondly, there is an indirect effect on first-tier administration. This effect is not, as one might have expected, that adjudication officers are influenced in their future decision-making by the decisions of SSATs, but rather, that the prospect of an appeal encourages a more thorough examination of a case before any decision is taken. The reasons for this were mainly to avoid having to spend time and effort preparing and presenting an appeal.

"... if I'm not sure in my own mind that it's right and have to explain the decision at a tribunal then you've had it. And an appeal takes an awful lot of time; I try to avoid them like the plague." (Adjudication Officer, Office #11)

For some adjudication officers the way of avoiding appeals was to be as certain as possible that the decision was correct, rather than tailoring their judgements according to an assessment of how a tribunal might react to the case.

"If I am making a decision that I have had to weigh up I tend to think: if the claimant appeals can I support it? I get to the stage where I think I'm going to disallow this and I say 'all right, if he appeals what is my defence?'. But I'm not just making a particular decision to avoid an appeal, I wouldn't do that." (Adjudication Officer, Office #1)

However, there is also a negative indirect influence on decision-making. Some adjudication officers would prefer to err on the side of the claimant, by making an award in a borderline case even though they considered that a disallowance was warranted, if they thought that the SSAT would also err on his side. This was particularly the case on special hardship allowance appeals where alternative earnings figures were often presented at the appeal hearing.

"... we know what they are going to decide on some cases like comparison of earnings, they are going to allow the appeal especially if a representative gives alternative figures. So, if we have any doubts we do err on the side of the claimant, especially if we think a tribunal will give it to them anyway." (Adjudication Officer, Office #11)

Another influence acting on adjudication officers which might lead them to avoid making disallowances on marginal cases was the cost of appeals, in both money and time.

"... cost-effectiveness is another relevant factor, you think, is it worth disallowing a claimant for a couple of days if he is likely to appeal and hence cost the DHSS hundreds of pounds and the adjudication officer hours of time regardless of the result." (Adjudication Officer, Office #13)

A more rigorous approach was preferred by other adjudication officers.

"... if you think a disallowance is the right decision and you can justify it even though it is possible that an SSAT might decide otherwise, then you should do it; giving the claimant the benefit of the doubt doesn't really come into it, the case should be decided on the facts." (Adjudication Officer, Office #3)

The indirect influence of SSATs therefore pulls in two directions. Firstly, it encourages adjudication officers to scrutinise their own decisions more closely (especially on borderline cases) and to seek further evidence, or refer for advice in order that the decision is more firmly grounded and not dependent on subjective judgements. Secondly, it encourages taking the easy option in hard cases, ie allowing a claim where perhaps it is not justified, (since claimants awarded a benefit generally do not appeal), and there is only a slim possibility that the case will be scrutinised as part of a monitoring check. It is ironic that those who adopt the more rigorous approach (being the one which promotes accuracy) may cause themselves more work, have more of their decisions overturned by SSATs, and hence attract the criticism of their superiors for 'losing' cases.

(b) Fairness

Promptness

Of all the thirty plus social security benefits, disablement benefit and special hardship allowance are probably the most vulnerable to delays caused by factors outside the control of the DHSS. On every claim there will be at least one enquiry to an existing or previous employer, and in the case of some prescribed diseases (for example, occupational deafness) the total can easily run into double figures. In addition, it will frequently be necessary to contact witnesses on industrial accident cases. Furthermore, once the accident decision has been made or the prescription test satisfied for a prescribed disease, then a medical report from an AMP or medical board is essential. It may also be necessary to seek additional information from hospital casenotes or consultants (indeed on prescribed diseases confirmation of the disease or injury is always sought from a recognised authority).

Much time in the decision-making process is therefore spent waiting for replies to enquiries, or for routine medical reports to appear. The response from employers is subject to enormous variations; in firms where there is an occupational health department and an efficient accident recording system, replies can be by return of post such that an accident decision can possibly be made within a week of receiving the initial BI 95 claim form from the claimant. But where a firm has no connection with the claimant or with the claim (for example, in special hardship allowance cases where wage levels of a suitable alternative employment are being sought) long delays (or no reply at all) are a common experience. Disablement benefit clerks who oversee the collection of information have a routine procedure for bringing cases forward on a weekly basis to check for outstanding replies, and of sending reminders after a suitable time has elapsed (usually a week). If two such reminders do not prompt any response

then the clerk may make some alternative attempt (where one exists) or refer the case to his supervisor (in practice often the adjudication officer) to advise on further action.

The whole procedure usually takes months; on one case discussed with an adjudication officer the comment was made:

"How long did this one take? Five and a half months? That's normal for a straightforward prescribed disease case." (Adjudication Officer, Office #9)

No official measure of promptness (for example, 'clearance times') is made by the DHSS and it is clear then that any meaningful form of 'performance indicator' based on the time taken to clear a case would be virtually impossible to construct. Nevertheless, there seems little reason to believe that cases are delayed deliberately; it would certainly not be in the interest of adjudication officers, nor the local office, to delay matters. Backlogs of work and the potential for complaints from claimants (and the time required investigating and replying to them) are sufficient disincentives to adjudication officers, HEOs, and managers to ensure that as much time as is considered necessary for a satisfactory conclusion to a case is actually expended. If dangers exist in the lack of formal measures of promptness they lie in the tendency to cut short investigations in order to clear a case, as the observations by adjudication officers on the conflict (actual and potential) between speed and accuracy, discussed earlier, indicate.

### Impartiality

Disablement benefit decision-making relies heavily on the quality of the evidence upon which the adjudication officer has to base a decision. In the two distinct phases of, firstly, the collection of information and secondly, deciding the facts from the evidence, there is scope for bias and prejudice to intrude. The official response to

this possibility is the advice to the adjudication officer in the IOG that he or she refrains from personal contact with the claimant and makes his decision on the papers alone. The other source of possible bias is the organisation of the DHSS, which the independent character and structure of adjudication are intended to counteract.

Adjudication officers were asked a series of questions about whether they felt the advice in the IOG was sound or problematical, and what their 'independence' meant to them in practice. As the quotations below will show there was a wide range of responses; whilst also apparent was the occasional confusion between physical separation from the claimant and independence from the DHSS.

"... if you haven't seen the claimant then you cannot be adversely affected by him, or vice versa. I think it is better for there to be a degree of separation so that you are only dealing with the facts of the case and not the personalities involved." (Adjudication Officer, Office #4)

"It revolves around this independence, you don't want it to appear that the adjudication officer is so closely connected with the Department. Also you don't want personalities to come into it if you can possibly avoid it." (Adjudication Officer, Office #1)

Other adjudication officers thought the IOG advice more a hindrance than a help,

"... there may be something that comes out in a conversation that could be very relevant, but the claimants do not know the rules and regulations and so don't know what is relevant to us and what isn't. I've always thought that more contact with the public would give us more of an opportunity to explain what it is we want from them and what it is we are trying to achieve." (Adjudication Officer, Office #12)

"Sometimes a claimant will phone up and ask to speak to the adjudication officer who made the decision but strictly speaking we shouldn't. I like to speak to the claimant and I feel stupid telling the claimant that he can't. It's most peculiar and unnecessarily and only alienates the claimants from us." (Adjudication Officer, Office #6)



Since it is considered legitimate for supervisors, but not for adjudication officers, to see claimants to explain what is happening with a claim or to answer any other queries, difficulties are experienced by officials who combine both roles.

"... you get the stupid situation of having to go down to the counter as supervisor, which I will do if necessary, and saying that it is not up to me, it's the adjudication officer who deals with it and he's not allowed to get involved with the public, while you know all the while that it's you who is going to make the decision - you feel stupid." (Adjudication Officer, Office #8)

Another reason why adjudication officers tried to avoid contact with claimants was that they felt that their role of amicus curiae at any future tribunal hearing would be jeopardised by seeing the claimant, whether to elicit information or to explain a decision.

"I can hardly appear independent if I'm in the DHSS office collecting the information at the counter." (Adjudication Officer, Office #3)

Most adjudication officers recognised that it is possible for bias to creep in to decision-making and that the risk is greater if there has been face-to-face contact with the claimant since it is inevitable that some form of personal opinion about him will be formed. Hence, in offices where there was more than one adjudication officer, it was the practice to hand over the decision to another adjudication officer if the claimant had been seen.

Bias and prejudice do not only threaten the adjudication officer, however. The disablement benefit clerk who performs the essential function of gathering information at interviews is also vulnerable. One admitted that it was possible to take down evidence and present it in a way favourable to the claimant. Alternatively, he could relay some other response to the adjudication officer in the way that a claimant's statement was written, notwithstanding that the claimant is asked to read and sign the submission.

"It is always possible, for example, to put down two suggestions for 'suitable alternative employment' but put more emphasis on one of them." (Disablement benefit clerk, Office #2)

Adjudication officers had different experiences and notions of the importance of the independence of the adjudication function from the DHSS and its other concerns. Many felt their official independence to be very important:

"I think it is very important to be independent of the Department as it might make you fairer to the claimant and that's the main thing, being fair to the claimant." (Adjudication Officer, Office #11)

"Oh yes, it's very important. If anyone tries to influence us we take no notice and just do what we want to do." (Adjudication Officer, Office #13)

The bulk of the criticism about so-called independence centred around the actual and potential pressure from management (at HEO and office manager level) on their general approach to decision-making or to individual cases.

"If the manager came in and said he wanted something done in a particular way, it would take a lot to go against him and do it another way, but I have not been in that position. But I have been in disagreement with the HEO and I suppose it is at the back of your mind whether it is better to give the decision that is wanted, if you see what I mean." (Adjudication Officer, Office #3)

Some adjudication officers were concerned that by standing up to such pressure they were possibly harming their future careers.

"It is nice to be able to say - Look, I'm an adjudication officer, I must give due time and due consideration to any decision on a claim and although you are my manager I'm not prepared to accept any interference from you whilst doing that job. Now whether that does your career any good I don't know." (Adjudication Officer, Office #13)



"... if you made a decision that your senior officer didn't agree - well, you probably wouldn't be an adjudication officer for much longer." (Adjudication Officer, Office #2)

The concern with management pressure was real though rarely grounded in personal experience. However, the comment of one manager suggested that such concern was not necessarily misplaced.

"I can't go and say to the adjudication officer 'that decision is wrong, change it'; theoretically anyway I've got to say 'I don't think that decision is right because of A, B, and C; don't you think you should have a look at it again'. But the adjudication officer will usually change his decision anyway; theoretically, he could say 'no, I don't want to change that decision, I think I'm right'. But they know that they shouldn't be causing ripples for the office or problems for the manager, because if they cause problems for the manager, then, OK, they can get away with it on the adjudication side because they can fall back on their independence, but their judgement will be called into question and so forth when it comes to promotion." (Manager, Office #3)

Bias and prejudice can never be eliminated from decision-making. For most adjudication officers it seems that they arise more by necessity (ie being obliged to see the claimant either in a supervisory capacity or as the most effective means of collecting the requisite information). There seemed to be some confusion over what an independent status demanded; some took it as requiring physical separation from the claimant, which is not the case (after all, the SSAT is not considered biased because it holds face-to-face hearings). It is clear that the adjudication officers' desire for good quality evidence has to be balanced against the need to detach themselves from claimants and any personal impressions that may have been formed about them from whatever source.

### Participation

The analysis of the decision-making process in chapter 2 suggested that the participation of the claimant would be most appropriate and make the greatest contribution to accuracy where there were evidential problems (ie box (2) and box (4) problems of figure 2.8; see p.71). The analysis in this chapter has shown that the adjudication officer's greater problems in deciding disablement benefit claims lie with the evidence rather than the interpretation of the law. It might be expected, therefore, that the claimant finds a greater role to play in the routine administration of disablement benefit than with other benefits. As far as this study allows a comparison, this indeed appears to be the case.

Whenever there was some doubt relating to the evidence either on an industrial accident, a prescription test for a prescribed disease, or on the lay elements of special hardship allowance, the adjudication officer in the local office was almost invariably prepared to call the claimant into the office for a personal interview. Difficulties arose in the London South Region, however, since, except for a few local claimants, it was impractical to invite claimants to one of the three Benefit Offices; instead, where a personal interview was deemed necessary the claimant was asked into their nearest office where a clerk would conduct the interview and elicit information according to a brief prepared by the relevant Benefit Office.

Participation, however, cannot really be considered to be pursued per se, as an inherently desirable feature of the decision-making process. Rather, involving the claimant has two purposes; firstly, as mentioned above to collect information, and, secondly to take the opportunity of telling the claimant about his claim, particularly when a disallowance or a less than full award of special hardship allowance looks likely. Whilst the claimant can always request an interview, the vast majority are instigated by the adjudication officer who, through the

disablement benefit clerk, will in effect retain control over the encounter, the claimant having to respond to a series of questions whose relevance or importance he or she may not grasp.

The interview takes place primarily for the benefit of the adjudication officer who is concerned with gathering information on which to adjudicate. This will occasionally involve weighing incomplete or contradictory evidence, but it is rare that the claimant will be aware of this, and so will rarely be in a position to respond to the evidence of others knowing that it is prejudicial to the claim; the interview will be carried out in a spirit of seeking more information, clarifying details etc, rather than as a quasi-judicial exercise where evidence is openly available to be scrutinised and refuted if necessary. Where the claimant is given this opportunity, it is only on the personal initiative of the adjudication officer through the disablement benefit clerk. And here only an explanation of the difficulty the adjudication officer is faced with will be given, rather than giving the claimant an opportunity to reply to any adverse evidence (which will only be made available should he or she appeal).

The conclusion that must be drawn, therefore, is that while disablement benefit and special hardship allowance decision-making allow a certain degree of involvement of the claimant, participation, in the wider sense adopted by this thesis, is not well-served.

#### Accountability

Communication with the claimant is the responsibility of the Secretary of State not individual adjudication officers. If adjudication officers wish to contact the claimant for any reason they instruct the Secretary of State's representative in the local office (the disablement benefit clerk) on what is required. By far the most cost-effective method of communication on a mass scale is the use of pro-

forma letters and forms which the DHSS uses in abundance, both to seek information from claimants and to inform them of the outcome of their claims. For claimants receiving everything that they claim there is probably little of interest in a formal notification, bar the amount of benefit to be paid, but for unsuccessful claimants, knowing the reasons for the failure of their claims is essential if an effective appeal is to be made. Whether the forms used by the DHSS achieve this purpose is often doubted by those having to issue them. Many felt that they can be too legalistic, steeped in jargon, and lacking any real explanation of decisions, even though improvements had been evident in recent years.

"The claimants are generally unaware of what factors have been considered in reaching a decision, even appeal decisions." (Adjudication Officer, Office #4)

"The attitude used to be: 'if you ask, we'll tell you', but its not like that now - its much more open. We're dealing with people with very different intellectual backgrounds, it's difficult to strike the right balance in forms and letters. Someone might think a form is condescending and someone else not understand a word of it. Communicating adjudication decisions is difficult because they have to mention so much legal jargon." (HEO, Office #6)

A minority dissented, however:

"If every time you asked for a piece of information you've got to tell them what it is in connection with exactly, and every time you make a decision you've got to explain the reasons behind it it would be totally time-consuming and impossible. (ex-Adjudication Officer, Office #9)

The policy of the DHSS until very recently has been that claimants should be given a formal notice of adjudication officer's decisions quoting the relevant legislation under which the decisions were made, and informing them of their appeal rights. Recent changes have sought to make the contents of such letters more comprehensible to the public rather than to provide them with the reasons for decisions. Nevertheless, the desirability of giving reasons is recognised at all

levels of the regional organisation, not only per se, but also (and perhaps primarily) because a claimant with a reasoned explanation for a decision is thought to be less likely to appeal against the decision, a situation which, as was explained earlier, the adjudication officer tries to avoid if at all possible.

"... if I think a case has been confusing, I call people in ... you get the decision letter through the post with all this 'Social Security Act' and they don't understand it, but where somebody actually sits down and says 'to get this benefit this has to happen' and you explain it they are more likely to accept the disallowance ... It's time-consuming but no more than spending three hours writing an appeal and three hours at a tribunal ... you may spend 25 minutes but you save six hours." (Adjudication Officer, Office #9)

The recognition of the desirability of giving reasons manifests itself in different ways, mostly in the individual actions of adjudication officers and in the use of local forms (prepared either by and for the use of one local office only, or on a regional basis for all local offices). Local forms and letters were most prominent in special hardship allowance cases where an appeal frequently arose because of a dispute over the earnings figures used in the calculation. They were popular with adjudication officers:

"I think here we do supplement decision letters with letters of explanation. I wouldn't say that the majority of disallowed claimants get an explanation, but if I think the claimant might think we had got it wrong then I would write out. We haven't been trained to do it and I think that the adjudication officers vary a lot... I always tell the disablement benefit clerks to call claimants in to explain disallowances where I feel that the claimant has not understood what has been going on, especially on SHA cases..." (Adjudication Officer, Office #11)

Whilst such letters may be effective, <sup>(39)</sup> their use was frowned upon by the CAO in his first report:

"The use in several offices of locally produced stencils on which adjudication officers gave their decisions contributed significantly to the high number of comments. Some stencils

containing errors or omissions were used over a large number of cases and comment sheets were therefore raised on each case." (DHSS, 1985e, para. 21, p.50)

Most adjudication officers were aware of the long delays that can result with disablement benefit claims although only a few took it upon themselves to offer the claimant any explanations:

"They don't get anywhere near enough explanation. As far as I know there is nothing that is sent out to them to explain that processing can take weeks, and maybe months, and not to be surprised to hear nothing for a while." (Adjudication Officer, Office #12)

"People can put in a claim and hear nothing for months, and paradoxically it is the straightforward cases which suffer more; if there are problems the claimant would normally have been contacted about them. (Adjudication Officer, Office #3)

Disablement benefit clerks, being faced with claimants in interviews were even more aware of the need to explain what was happening with the claim,

"... I explain things all the time. For example, in special hardship allowance, I definitely tell them that the medical board has found them fit for light work and that because the benefit is based on a comparison of earnings I need to know what they might be capable of." (Disablement benefit clerk, Office #1)

As with participation, the attention paid to accountability in disablement benefit decision-making results primarily from other motives, in particular gathering more information and, more importantly, avoiding appeals. That there is a concern with limiting the number of appeals is emphasised by the response of adjudication officers to receiving a letter of appeal from the claimant, when the opportunity is sometimes taken to offer a letter of explanation before processing the appeal in the hope that the appeal will be dropped. This practice is not wholly cynical however, there is also a genuine feeling that some appeals are made because the claimant does not fully



understand why it has been made (partly because of the poor communications from the DHSS in the first instance):

"On a clear-cut decision we will try to put them off with a letter of explanation rather than wasting their time, and ours, and incurring a lot of expense for everybody, by going to an appeal that they have got no hope of winning."  
(Adjudication Officer, Office #11)

The desire to avoid appeals clearly results in some claimants receiving more explanation than they otherwise would have done. But there are also dangers inherent in this approach. The claimant is in a particularly weak position, lacking knowledge of the law and of decision-making procedures, and he is vulnerable to a seemingly authoritative refutation of his case which may dissuade him from continuing an appeal which he may nevertheless have won. Adjudication officers may be convinced that their decision is right, but they can only be sure in relation to the evidence that they have before them; and as has been shown earlier it is not infrequent for additional information to come to light during the appeals process. So, some doubt must remain on even prima facie, clear cut cases. The desire to avoid appeals, therefore, can interfere with seeking the 'true facts' of the case.



(2) Administrative justice and medical adjudication

(a) Accuracy

The CAO, under whose aegis lay decisions are monitored, has no jurisdiction over medical adjudication. Furthermore, there is no comparable monitoring system by which standards can be measured. In a sense this has not been particularly necessary since the Regional Office Medical Officers (MOs), until very recently, used to operate a full scrutiny of all cases both before and after they were seen by a medical board.

The 'pre-board scrutiny', as it is called, entails each case being seen by an MO to ensure that any additional information that would assist the board could be acquired before the board actually sat. This avoided a possible delay later if the board decided to adjourn whilst further information was sought, and also contributed to accuracy by ensuring that the board had as many of the 'true facts' as possible before it when making a decision. Medical Officers most frequently requested a summary of the claimant's hospital casenotes (HCNs), a consultant's report, or an X-ray examination.

Pre-board scrutiny is time-consuming and in a large number of straightforward cases not necessary at all. As a result, pre-board scrutiny is no longer carried out on all cases, but is restricted to a narrow range of cases where HCNs or consultants' reports are almost invariably necessary. This typically occurs when the AMP (usually a GP or ex-GP) cannot be expected to have the requisite specialist knowledge to decide a claim, for example, on eye or ear injuries, or neurological damage caused by head injuries. One Medical Officer explained how the cost of pre-board scrutiny had been cut by the recent changes, but also noted that there had been a price to pay.

"It would be impossible to justify pre-board scrutiny of a cut finger; but until you have actually seen the file you cannot be sure that it is just a cut finger. It is said that

medical boards are perfectly capable of calling for any further information they need; this is sometimes the case but sometimes they do not call for further information when we think it would have allowed them to make a more accurate and fair assessment. It is much better to get the relevance and the assessment fixed at the first board. It is something I feel very strongly about because we end up with bad decisions; it is not fair to the claimant. The claimant may get 20% from one board and nothing from the next, he may be told that his condition is due totally to his accident and then that it is not relevant at all; this leads to appeals. I would like to see a far higher proportion of cases pre-boarded so that we get it right at the first board which makes all the subsequent boards easy." (Medical Officer, Region #1)

The 'post-board scrutiny' is intended as a check on the decisions of AMPs and boards to ensure that they are reasonably based on the evidence and to identify any simple errors that might have been made. The Adjudication Regulations 1984 allow the decision of a medical board to be referred back when there has been an obvious clerical or technical error (such as quoting a wrong date, or transcribing left leg as right leg), but do not sanction any disagreement with the percentage assessment being raised, except as a Secretary of State reference to the MAT.<sup>40</sup> Again, a system of 100% scrutiny used to operate, but this has been reduced recently to 10%.<sup>41</sup> A Medical Officer explained the purpose of the check.

"I'm looking for harmful information first of all because that is the only thing I can send back in my own right.<sup>42</sup> I'm also looking for correctness in the actual completion of the form; if the form is so incorrectly completed that the decision could not be promulgated then I would draw the attention of the Medical Boarding Section EO to this - it may be a small thing like a missing date - and it is up to him whether this is something that can be returned or not. The other thing that I am looking at, considering the case as a whole, is whether the decision is fair to the claimant and fair to the Secretary of State. By seeing thousands of cases over the years one gets to some sort of appreciation of what is a fair award for a given disability and if it is outrageously outside what the evidence in the file says, either in the claimant's favour or against the claimant." (Medical Officer, Region #2)

Rather than being unpopular with AMPs, post-board scrutiny was seen as useful.

"They only do spot checks now; it's not really enough. 100% checking used to give you confidence that the occasional bad decision was picked up." (AMP, Region #2)

Another cost-cutting measure which has coincided with the reductions in pre- and post-board scrutiny has been widespread use of a single AMP to replace the two-doctor boards on injury assessments (prescribed disease cases are still seen by two doctors). Reaction to this change has been mixed; some doctors welcomed it because they preferred working alone (either out of a natural bent, or because of a lack of faith in some of their professional colleagues), and thought they could deal with cases more quickly. But the majority saw the two-doctor board as having marked advantages over working alone; the clerical work was easier (one doctor could complete the examination notes on the BI 118 medical report form whilst the other carried out the physical examination), they were able to discuss the percentage assessment which led to more balanced decisions, and, therefore, the claimant could be more satisfied that justice was being done.

"I'm not suggesting that one doctor boards are giving grossly wrong decisions, but I do feel that with two doctors better decisions usually emerged." (AMP, Region #1)

A Senior Medical Officer had no doubt of the effect of these changes:

"... standards have all gone down because single-doctor boards are not giving cases due consideration. When I say that the standard is falling I mean that they will cut corners such as not adjourning for further information when they clearly should." (SMO, Region #1)

Most doctors did not consider that their own decision-making behaviour had altered, although one recognised the danger and thought that an occasional two-doctor board would be useful:

"A two-doctor board might serve as a form of quality control; I mean that I could gauge whether, as a single doctor board, I was slipping into a more or less generous style." (AMP, Region #3)

### Training

Training for AMPs does not adhere to a strict pattern but tends to be tailored to what the Regional Senior Medical Officer perceives as necessary for each individual. An initial meeting or two will be held during which the Industrial Injuries scheme and the duties of the AMP are explained (plus the details of any other benefits that he may also be reporting on, for example attendance allowance or mobility allowance) and he will be given guidance documents, most importantly the Industrial Injuries Handbook (DHSS, 1986a). The new recruit will then join an experienced boarding doctor as the second member of a two-doctor board. After a time he or she will act as Chairman with a Regional MO as the subordinate member. When the MO judges that the new AMP is competent to act as a single-doctor board, he or she will be allocated cases accordingly by the Regional Office Medical Boarding Section.

Most doctors, both AMPs and DHSS MOs, felt that direct experience was the most effective form of training, and allowed the AMP to gain in competence quickly. In contrast, relying on them to undertake a certain amount of self-instruction (which is required of the lay adjudication officer) was considered impractical. As with adjudication officers, it was felt that not every doctor could fulfil the role of AMP satisfactorily, although once appointed the new AMP was, in practice, difficult to remove.

"I think the only way you can train a medical boarding doctor is actually physically doing it, filling in the forms as you go along, explaining after you have seen the claimant why you do a certain thing. My only concern in that respect is that if you take on a doctor as an AMP you take him on full-time, as it were, without any probationary period. Once you have got him you are stuck with him, good, bad or

indifferent. Perhaps there should be a period of say three months or so many sessions after which a decision could be taken about the suitability of the doctor for this kind of work." (SMO, Region #2)

Remedial training was often felt to be necessary for less than satisfactory AMPs but it was only one of a number of tactics adopted to deal with him. One SMO explained his arsenal:

"The question is what can we do when we pick up mistakes. The only thing we can do legally is to refer the case to an MAT. If we find a doctor who is making the same daft mistake time after time, we can take completed cases back to discuss with him or we can constitute two doctor boards for him to sit on with a full-time MO as the other doctor. This is a fairly good way of approaching the problem. You can cut down his sessions but there is a limit to that because of the workload, and in any case what do you say when they ring up to complain that they are not getting boards any more. In brief, there is really no carrot and no stick, all we can do is to try to cajole and persuade. I would love to be able to say, without any ill feeling, to a few of them that this kind of work is clearly not their cup of tea and that we ought to part company. There are about 5-10% of these people who I would just like to get rid of. It is very difficult in general to change anybody's attitude and in most of these cases it is a matter of attitude; if the chap does not really care, if his attitude to the whole process is 'this is a cushy way of earning £50 in an afternoon' it is not easy to persuade him to put in more commitment and to think more about what he is doing." (SMO, Region #3)

Clearly, practising GPs cannot be expected to devote as much time to training as the captive novice adjudication officer. But one of the dangers in the relatively informal arrangements that exist at present is that the importance of the essentially legal character of much of what they are expected to perform is lost.

#### Advice

Coincident with changes in the advice arrangements on the lay side, there have been developments on medical adjudication which have



revealed that the somewhat ad hoc arrangements of the past have contravened the principle of independent adjudication.

The discovery of the unacceptable practice of Regional Office Medical Officers referring mobility allowance cases back to AMPs or medical board chairmen in order to get a decision changed (see chapter 6), has led the DHSS to instruct MOs not to have any form of contact with AMPs about individual cases regardless of the benefit involved. Prior to this MOs were often called upon by AMPs to advise on difficult cases (in much the same way that the RAO Section advised adjudication officers in local offices). The situation now is that, apart from the Industrial Injuries Handbook the AMP has nowhere to turn to for advice, except perhaps to his peers. Nevertheless, not many felt very inconvenienced and most relied more on their own experience to deal with difficult cases.

"We see each other when we are in the boarding centre. We do discuss cases; if problems arise with particularly difficult cases we discuss them, it is very helpful." (AMP, Region #2)

"I've opened the II Handbook only on rare occasions - five times in 40 years. There were no problems getting help when there was a Medical Officer on site, but now if I'm stuck I'll ring the Regional Office, or I'll pop in and ask - we're not supposed to do this, by the way. But we must not talk specifically about individual cases, only in general or hypothetical terms. It's a damned nonsense; two heads are always better than one." (AMP, Region #3)

One Regional Office Medical Officer felt that his role was now extremely limited.

"I am not allowed to advise specifically on a case but I can comment in broad terms, although this is not very common. An AMP may ring up and I will reply in 'general' terms, which is somewhat of an artificial distinction. And of course he can ask for more evidence, HCNs, X-ray reports etc which we will get for him; we just act as medical clerks really." (Medical Officer, Region #1)

The recent changes clearly upset many DHSS MOs with their implication that they were only acting as agents of DHSS policy. One SMO summed up his feelings:

"Officially they should not come to us, and when AMPs do ring us we have to tell them we cannot help. But there are ways of bending things; you could treat the question as a kind of hypothetical case when we half know that it isn't, and so discuss things in general terms. We do not quibble with their status as statutory authorities, we never have, and we do not argue with the fact that some permanent staff in the past who have now retired went beyond the limits to the extent of telling boarding doctors that they will change this assessment or that period of award. We recognise that this was wrong, but we, and I think I can speak for all SMOs collectively, cannot see why the lawyers are so adamant that we cannot give these people reasonable advice. It would save so much money apart from everything else. But as things stand, all I can do is to have as many as possible of my MOs sit in on two doctor boards and hope some of the correct practices rub off." (SMO, Region #2)

As with training, the arrangements for advice giving to AMPs are poorly developed when compared with the lay side. The DHSS edict to its Regional medical staff to refrain from advising on individual cases, certainly stopped a practice in which bias could have intruded, but there have been no replacement facilities with the resulting confusion and frustration amongst DHSS doctors and the independent AMPs.

### Monitoring

Whereas the lay monitoring system is intended to furnish the CAO with the raw material for his annual report, the monitoring that is carried out on medical adjudication serves no such purpose, but is geared to improving standards. Even with the reduced 1 in 10 scrutiny, MOs are still concerned with identifying the weak AMP and taking what limited action is open to them. The importance of making a good first assessment was always recognised.



"If an AMP makes consistent errors, ie decisions which do not follow from the evidence, he will be spoken to. If one of them is in the habit of making a complete porridge of things one has to try to get him to change because an MAT case costs several hundreds of pounds; there is a cost that comes into this." (Medical Officer, Region #1)

One SMO thought the emphasis of monitoring was misplaced, however.

"I may have got it wrong but there seems to be an assumption in the Department that everybody is going to get everything wrong unless they are very closely supervised and have their wrists slapped pretty frequently. I do not think that this is right, it should be more of an educational process. After all you are paying quite a lot of money to fairly highly educated people and the assumption should be that they are going to get it right, you should not be fault-picking as such, and probably under lay side influence we have adopted their attitude." (SMO, Region #2)

But for most AMPs, whilst they were aware of the post-board scrutiny, there was little awareness that this constituted a formal monitoring of their standards of work.

One feature of medical monitoring is its low profile compared with lay monitoring. It would probably be an exaggeration to suggest that monitoring by DHSS MOs is covert since, most AMPs were clearly aware of post-board scrutiny, but there is no formal reporting back of standards to individual AMPs or to medical boards comparable to a Regional monitoring team report. Rather, the results of post-board scrutiny are used to identify poor AMPs in order that some remedial action can be taken. This difference in approach would seem to derive from the attitude of DHSS MOs to their professional colleagues, as revealed in the quotation above from a Senior Medical Officer, ie that professionals exercising their specialist knowledge should not be subject to the same kind of scrutiny as 'untrained' clerical staff administering a set of statutory legal rules. That AMPs are also operating a system of statutory legal rules seems to have been conveniently overlooked.

Although the monitoring of medical decisions is carried out by Departmental officials, not an independent agency comparable to OCAO, and despite the recent replacement of 100% post-board scrutiny by a 1 in 10 check, Medical Officers were confident that the current arrangements allow them to identify and take action on unsatisfactory individuals, even if they lack the ultimate sanction of removing them from the panel of approved AMPs.

#### Medical Appeal Tribunals

Whereas the spectre of an SSAT hearing often prompted the lay adjudication officer to take a more rigorous approach to decision-making on individual cases, there was little evidence of an equivalent effect on the medical side. AMPs seemed little affected by the anticipated response of an MAT to their assessments, nor (and here they resembled adjudication officers) were they much influenced by overturned decisions, although some found MAT findings useful. Of the 16 interviewed only two thought that were affected in advance.

"One does try to think in terms of how an MAT might decide a case. Getting the results is very useful. I remember a recent case where the MAT took a different view to me which I will remember in future." (AMP, Region #1)

"I'll try to avoid an MAT if possible since they are so expensive... I'm sure their decisions are lodged in my subconscious." (AMP, Region #1)

For others, MATs were either of passing interest only, or virtually negligible;

"We don't regard MAT results as precedents - they give such a wide variety of decisions. They don't influence us." (AMP, Region #3)

"I get a bundle of cases months and months after I've seen the case when I've forgotten all about them; they're of academic interest only." (AMP, Region #2)

"You can't take any notice of them; sometimes the results are a complete laugh." (AMP, Region #1)

There are several reasons why appeal tribunals should have such disparate effects on initial decision-makers. Firstly, the nature of the decision required of AMPs is different from that demanded of adjudication officers. For the latter, most decisions are black or white (for example, either a claimant suffered an industrial accident or he did not; or, either a claimant has worked in a prescribed occupation or he has not), but for AMPs the most common decision is at what percentage level a claimant's disablement should be assessed. So, in practice, they have a choice, not from only two possible decisions, but from a range. AMPs fully expect, therefore, that there will be a degree of variability between themselves (and with MATs) without there necessarily being any inconsistency in their decisions. That a colleague, or an MAT, chooses to award a slightly different percentage figure, therefore, tells them little about their own standards. Furthermore, some AMPs expressed a suspicion that MATs who awarded 1 or 2 % above their own assessment, or extended the period of a provisional award by a few months, were really just offering a convenient sop to the claimant, rather than venturing any criticism of the original decision.

#### Promoting accuracy - a summary

Whilst less rigidly defined, the structural features of medical adjudication which tend to promote accuracy could be argued to be as effective as for lay adjudication, but their strengths and weaknesses tend to be in different areas. The structure of training is reasonable and sufficiently under the control of MOs to ensure that AMPs reach an adequate level of competence before commencing their solo careers even if some seem to lack a full appreciation and understanding of the legal nature of much adjudication. The advice system has been severely weakened, however, without any compensatory developments. Monitoring, despite its recent retrenchment, can still

identify weak AMPs and prompt remedial, educative action. The appeals structure appears largely irrelevant to standards but, as it was never intended to contribute to them, this cannot be taken as criticism of the present arrangements.

Particular problems arise from recruitment policy, however. One SMO has already been quoted as saying that it is difficult to remove a doctor from the boarding panel, and a Medical Officer that he laments the lack of a 'probationary period' for new AMPs. The result is that in some areas where recruitment is difficult, unsatisfactory doctors can remain on the panel, and unlike the local office they cannot subsequently be found a niche elsewhere in the system.

#### **(b) Fairness**

Like elements of the lay decision-making process, medical adjudication relies on evidence from outside sources (mostly hospital casenotes and consultants' reports) which makes promptness a difficult concept to put into practice. The AMP himself has no control whatsoever over the process (except where he requests further information) but merely sees cases when instructed by the Regional Office Medical Boarding Section.

Bias and prejudice can find expression in the assessments of AMPs give since there is usually an element of choice in what percentage figure to award (except the scheduled assessments) or what offsets or greater disablements are relevant. Whilst adjudication officers can remain separate from claimants, there is no question of AMPs similarly keeping their distance such that any interaction between them may colour AMPs' judgements.

On the medical side, there is little meaningful participation by claimants in the decision-making process. In practice, claimants are subject to a series of questions from which the AMP will complete the

'claimant's statement' on the BI 118 but apart from that a medical examination will proceed anonymously. No indication of the AMP's assessment is given until the claimant receives the official notification of the decision later. One doctor saw this as inadequate,

"I go to some lengths to explain the implications of the examination, although I never mention percentage assessments. For example, on a second board after a provisional award I would explain that the examination might lead to an increase or a fall in benefit. Claimants should know what is happening to avoid the possibility that they may feel they were 'being done' by the system." (AMP, Region #1)

The medical assessment is received on a standard form which compared with adjudication officer decision letters is relatively informative, giving the AMP's assessment of the claimant's condition and any pre- and post-conditions which affect the percentage figure awarded. But there was doubt about whether this was adequate

"It would be very difficult to explain to a lay person why they were assessed, say, at 5% for a lower back injury. It might be easier to put it in words on a form; for example, '5% is awarded on the basis that he was only off work for three weeks after the accident, there are no neurological signs, and physical examination shows only minimal limitations of movement', something like that. I think that would be entirely reasonable, and far more useful from the claimant's point of view than worrying about the relevant loss of faculty. I do not see why you cannot give these people a simple, straightforward explanation in non-legalistic terms, they pay into a scheme to cover them against injury at work and so should be entitled to know why they have been awarded so much money." (Medical Officer, Region #2)

The difficulty of giving a meaningful explanation of an assessment mentioned above, results from the artificiality of a scale of percentage points assigned to various disabilities. To say that a person who has lost a thumb is 30% disabled, or a person having had both legs amputated is 100% disabled, is meaningless in any medical sense; the quantification of disablement is only a necessary legal

construct. The prescribed assessments in Schedule 2 at least provide a comprehensible explanation of a particular assessment where relevant (ie 'you have lost a thumb, therefore you are assessed at 30% because that is the law'), but for other disabilities (for example, those resulting from back injuries) such an explanation is not available. Nevertheless, this should not prevent a greater level of explanation, such as that suggested by the Medical Officer quoted above, being possible. At present, however, accountability to the claimant is as poorly served on the medical questions as it is on the lay questions.

## **Part IV - DISCUSSION AND CONCLUSION**

This chapter has used the theoretical approach developed in chapter 2 to analyse empirically decision-making on initial claims for industrial disablement benefit (and one of its additions, special hardship allowance). The aim of this concluding section is to review briefly the conclusions reached and to identify possible ways in which the decision-making system for industrial disablement benefit could be developed to promote the satisfaction of the demands of administrative justice.

### **1 - The lay decision-makers**

#### **(a) The complex task of routine decision-making**

The analysis in this chapter has demonstrated clearly that to call the activity of front-line officials 'routine decision-making' disguises the complexity of the task that confronts them. Industrial disablement benefit itself is a complex benefit. It can be claimed following an industrial accident or by contracting from one of over fifty prescribed conditions. When it has been awarded the claimant is entitled to claim a number of additional benefits. An analysis of disablement benefit decision-making, therefore, requires a series of separate analyses involving the various elements of the legislation and their related evidential requirements.

For some questions (for example, on industrial accidents) the policy space at the centre of the decision-making doughnut has been reduced as the accumulated case-law and legislative amendments since the inception of the Industrial Injuries scheme have added further layers of decision criteria within which the adjudication officer has to make decisions. For some other questions (for example, on the more recent additions to the list of prescribed diseases, such as occupational deafness), the policy space remains comparatively large, and is the



source of considerable problems for decision-makers. However, whilst the interpretation of the law remains problematic in some areas, the most difficulties for adjudication officers arise from the evidential requirements of the legislation, since there is often no definitive statement of what constitutes the evidence or where its limits lie.

Using the diagrammatic representation of the decision-making process introduced in chapter 2 (reproduced below), much of the activity on disablement benefit claims takes place within box (2), whilst box (3) problems arise occasionally. Decision-making within box (4) is not common but presents the adjudication officer with considerable difficulties, as for example on the occupational deafness condition of 'wholly or mainly in the vicinity of...'. .

		<u>EVIDENCE</u>	
		Clear	Not Clear
<u>DECISION CRITERIA</u>	Clear	(1) Routinised decision- making	(2) Questions of relevance and validity of evidence
	Not Clear	(3) Interpretation of decision criteria	(4) Both evidential and interpretive questions

Using the doughnut metaphor, what is happening within the policy space in the hole in the centre is that the choice between a number of possible decisions (which frequently reduces to a two-way yes/no choice) is made not by reference to an extraneous set of decision criteria but by the technique of 'balancing probabilities' with the constraint that ultimately it is for the claimant to prove his or her

case; ie the adjudication officer is asking whether on the evidence presented the claimant 'on the balance of probabilities' satisfies the statutory criteria. The collection of the evidence is therefore identified as a crucial and sometimes decisive stage in the process, thus placing a large measure of responsibility (and concomitant power and influence) upon the information gatherers, principally the adjudication officer and the disablement benefit clerk, and (perhaps unwittingly) on the information providers. As the law becomes more clear-cut then whosoever decides the information on which a decision is made, becomes the de facto decision-maker regardless of whom appends their signature to the final decision as the legal decision-maker.

The decision-making procedures for industrial disablement benefit and special hardship allowance are an aggregate of a series of decisions taken by various actors applying the appropriate decision criteria to the relevant evidence. And because each stage in the process, ie each sub-decision, affects the next stage it is as important that the demands of administrative justice are satisfied at each stage. But as the analysis of decision-making has shown, the various elements of administrative justice assume a greater or lesser importance according to where the difficulties or imprecision lies. For example, it was argued that where there are evidential problems then participation becomes more important as a means of ensuring that the 'true facts of the case' emerge. The validity of this is demonstrated by the fact that the SSAT, in which participation is an integral part of its modus operandi, is a more effective forum for eliciting information.

**(b) Administrative justice and industrial disablement benefit**

The results of the monitoring system presented in Part III suggests that standards of decision-making on industrial accidents and SHA claims have declined between the publication of the first two OCAO reports, and that decision-making on industrial disablement benefit is

similarly in need of improvement. However, it was also noted that the OCAO method of 'raising adjudication comments', which are then aggregated to give an overall picture of a local office's performance, is not entirely satisfactory as an accurate reflection of standards of adjudication. Furthermore, the manner of their presentation can often alienate those very officers whom the reports are intended to inspire to higher standards. There is clearly room for greater sophistication in the measurement and reporting of the accuracy of adjudication and lay questions.

Notwithstanding these reservations about the measurement of accuracy, there are several features of the local office decision-making and managerial arrangements that militate against the achievement of high quality decision-making. The demands of the combined adjudication officer/supervisor role clearly hinder the concentration required for the contemplative task of adjudication. There are also tensions created between the need to remain impartial, which requires separation from the claimant, and the need to supervise and assist clerical staff in their dealings with the public. The role of HEO/EO is fraught with problems, although on occasions an officer with the right background can fulfil the requirements of the post admirably. To be able to advise and check the work of adjudication officers HEOs need to be as good adjudicators themselves. This rarely occurs, and is likely to become rarer as HEOs lose, or fail to acquire, up-to-date experience of continually evolving legislation. The experience necessary for the adjudication officer to perform adequately is also frequently lost as staff on the EO grade are subject to the seemingly ubiquitous practice of staff rotation every two or two-and-a-half years. These difficulties could be tackled in a number of ways. Adjudication officers could be modelled on the erstwhile insurance officers, who had no managerial responsibilities but remained in their posts long enough to accumulate and make full use of adjudication experience. Alternatively the 'AO' part of the HEO/AO's remit could be strengthened, by, for example, reducing the number of their

management tasks, increasing day-to-day involvement with decision-making, and providing more frequent training. Adjudication could be further strengthened by the reintroduction of the advice function into the Regional Office to provide support for HEOs and adjudication officers. The importance of good and freely available advice is emphasised by the comparatively better performance of the London South Benefit Offices and the larger local offices (such as Doncaster) who have been able to compensate for the disappearance of Regional Office advice by turning to the fund of knowledge within each office which has built up as a result of the large disablement benefit workload and the number of adjudication officers in close proximity.

The administrative justice demands of participation and accountability are very patchily served in both the formal decision-making arrangements and the day-to-day practice of local office staff. How much the claimant is involved in decision-making and how much information he is given about the process and the decision itself, is dependent on the interest and diligence of individual staff, rather than acknowledged as a desirable aspect of their work. A requirement, therefore, that adjudication officers provide claimants with reasons for their activities and decisions could be the driving force behind greater participation, a greater guarantee of impartiality and hence a greater likelihood that an accurate decision emerges from the process. If this necessitates greater contact with the claimant then this should be tolerated, since the requirement to account fully for decisions should counteract any possible intrusion of bias or prejudice.

A peculiar feature of disablement benefit decision-making that, as far as is known, does not occur for any other benefit (except sickness benefit), is the mix of local offices and the centralised benefit offices. There is a current debate within the DHSS (following a recommendation of Oglesby (1983)) about whether the range of benefits for disabled people should be administered from Regional Disablement Centres rather than local offices, which make the London South

arrangements of particular interest and relevance.<sup>(43)</sup> From an administrative justice perspective there seems a strong case for some form of centralisation; the Benefit Offices return by far the lowest comment rates and because there are few competing benefits within the office (bar sickness benefit) and because cover is always available for absent adjudication officers, processing can be quicker. Furthermore, impartiality can be maintained due to the remoteness of the offices from most claimants. The one drawback, however, is that this remoteness and the lack of personal contact with claimants, hamper participation and accountability, which have been identified as being of particular importance in ensuring that the maximum amount of good quality evidence is available for the adjudication officer. And where evidence requirements are perhaps most difficult, on special hardship allowance calculations, it is not surprising to find that the benefit offices record their highest level of comments (see table 5.8).

## 2 - The medical decision-makers

Considerable efforts have been devoted over the past five years to the rationalisation of lay adjudication (especially with the introduction of OCAO and OPSSAT). The current arrangements for decision-making by medical practitioners has developed from a similarly loose basis (ie somewhat laissez-faire mixture of Departmental and independent functions) but are the result of two, rather different stimuli. Firstly, as a response by the DHSS to the recognition of certain legal deficiencies in the decision-making process (ie in the relationship between relevant loss of faculty, disability and disablement, and the illegal practice of Regional Office Medical Officers referring cases back to medical board chairmen). And secondly, in response to Departmental cost-cutting measures such as the reductions in pre- and post-board scrutiny, and the introduction of single-doctor boards.

The outcome of this avalanche of changes is that medical adjudication is in something of a mess. The confusion and difficulties experienced

by AMPs by the greater demands for a more legalistic mode of thinking required in the revised BI 118 forms may be expected to subside as experience is gained. However, the confused state of the advice and monitoring function of Departmental medical officers is likely to endure. A possible response to deal with these difficulties is the establishment of a medical equivalent of the CAO's organisation. A 'Medical CAO' could have similar functions of providing advice and guidance on medical questions (although his advice need not be restricted to medical practitioners, since adjudication officers also require medical guidance occasionally), and a responsibility for monitoring standards of decision-making. The obvious people to carry out these duties are the existing Regional Office Medical Officers who could be transferred to the establishment (though not necessarily physically) of the Medical CAO in order to maintain a comparable independence to the Southampton personnel. One immediate task of the Medical CAO might be to review the recent changes in pre- and post-board scrutiny to ensure that the new arrangements are adequate for monitoring purposes and for the maintenance and improvement of standards of decision-making. A similar review could also be made of the effect on standards of the introduction of single-doctor boards.

### 3 - Conclusion

The social security system is not a slave to administrative justice. As a branch of the state's apparatus it must perform a variety of different roles which may not necessarily be compatible at any one time. Social security in particular is an economic and social tool which the government can wield in order to pursue its own particular vision of social order. But for individual claimants such broad issues are far from their everyday concerns with their rights to be provided with every available assistance from a state service. And it is in this respect that administrative justice can serve as both a means of checking that the administrative agency is fulfilling its



responsibilities to the individual and of providing a prescriptive framework for future improvements.

This study of industrial disablement benefit decision-making has presented a picture of a system beset with anomalies and in a state of general decline. Such a conclusion arises not only from an analysis of the available documentary data but also, and perhaps more tellingly, from the experiences of those who have a responsibility for operating the system.

However, the analytical framework of administrative justice utilised in this chapter has not only provided a diagnosis of the problems of the system but has also enabled an agenda for reform to emerge. Some of these recommendations may have a wider applicability for other social security benefits, whilst others are more specific to industrial disablement benefit decision-making. Following a comparable analysis of mobility allowance decision-making in chapter 6, therefore, the concluding chapter will present a brief review of the policy ideas arising from the two empirical studies and suggest where reforms would be most effective in the pursuit of administrative justice.



## CHAPTER 6 - MOBILITY ALLOWANCE

### Part I - BACKGROUND

#### 1 - The Origins of Mobility Allowance

The mobility allowance was introduced in s.37A of the Social Security Act 1975 (inserted by s.22 of the Social Security Pensions Act 1975) and came into payment on 1st January 1976. Prior to 1975 assistance for people with restricted mobility had been mainly through the provision of invalid tricycles (or 'trikes' as they were more commonly known) or, for a minority, a small car. The introduction of this new benefit marked a distinct shift in policy away from help in kind to the provision of cash.

The origins of mobility assistance for the disabled can be traced back to 1921 and the introduction by the British Red Cross of motorised bath chairs for ex-servicemen disabled in the First World War. These single-seat, three-wheeler machines evolved into the familiar trike of the post-Second World War period. Help for the civilian disabled, however, was not available until 1948 when the relevant provisions of the NHS Act 1946 were implemented. Under the Act the trike became available to any claimant having one of the following three disabilities: (i) loss of both legs; (ii) defects in the locomotor system or heart and lungs which, to all intents and purposes, render him unable to walk, and (iii) a less severe disability than in (ii) but which made it impossible for him to travel to and from work (Ogus and Barendt, p.181). Also in 1946 a Royal Warrant empowered the Minister of Health to defray the costs of a car incurred by ex-servicemen who were severely disabled. In 1960, it was announced that most war pensioners (and not only those severely disabled) could opt for a car, either for themselves to drive or for another, nominated person. Again following in the slipstream of the war disabled, this

facility was extended in 1964 to disabled civilians who could satisfy fairly narrow eligibility criteria (the claimant, who had to be capable of driving, had to be living with a relative who was either eligible himself for a trike or was blind, or had to be in sole charge of a young child for a substantial part of the day).

Concurrent with the developments in the 1960s was the growth of a vociferous and increasingly influential lobby on behalf of disabled drivers and also, importantly, of disabled people unable to drive (and hence ineligible for a trike or car). Pressure groups campaigned to extend provision of vehicles to more groups of disabled drivers and non-drivers, and for claimants to be provided with cars rather than trikes (Large, 1977). It was argued that trikes were unreliable and dangerous; furthermore, they could not carry a passenger, and they could not be driven by some groups of disabled people (especially children) who were as much in need of assistance with transport difficulties as the actual beneficiaries. Partly as a result of this pressure, the vehicle service was under almost constant review by the Ministry of Health (and after 1966, the DHSS) from the mid-60s to the early 70s, culminating in the appointment of an independent inquiry (under the chairmanship of Baroness Sharp) in 1972.

Lady Sharp's report (DHSS, 1974a) acknowledged and endorsed the criticisms of the trike, as dangerous, unreliable and lacking passenger facilities, and of the vehicle scheme as unfairly discriminating against non-drivers. The proposed solution, however, ran contrary to the tide of opinion coming from the disability lobby; as Large writes:

"...all the organisations which submitted evidence to [Lady Sharp] asked basically for a cash solution to the mobility problem." (1977, p.198)

Despite the overwhelming support for cash rather than kind (seen as the only feasible method of introducing parity of treatment for

drivers and non-drivers), the Sharp Report proposed the abolition of the trike and its replacement, when economically feasible, by a small car, whilst the option of a cash allowance in place of a vehicle would be subject to tighter eligibility criteria. These proposals proved unpopular with the incoming Labour Government; the provision of cars to all trike owners would have been prohibitively expensive and the eligibility criteria suggested in the report (based on the need for a car to maintain or obtain employment) were seen as socially divisive (at a time of rapidly rising unemployment) and would also have disentitled some 13,500 existing beneficiaries (Brown, 1984, p.266).

The Government's response was to reject the Sharp Report recommendations and instead opt for a cash allowance to replace the invalid tricycle. With this political decision taken, the problem became more of a technical exercise: to devise a new benefit to replace the existing trike scheme which would be fair to all disabled people with walking difficulties, regardless of their age or ability to drive a vehicle. The task, under Ministerial surveillance, was entrusted to a small group of DHSS civil servants.

Within this group an early decision had to be taken on which groups of disabled people should be included in the new scheme in addition to the physically handicapped, who remained the main target population. Consideration was given to mentally handicapped, mentally ill and blind people with mobility problems, but none of these groups was eventually included. The reasons for this were partly because of the high costs involved and partly because a physical test of walking difficulty kept more closely to the eligibility criteria of the trike scheme, which was considered desirable since many of the first recipients of mobility allowance would be trike owners who were 'blanketted in', ie not required to satisfy the new criteria. Furthermore, it was considered that the blind, mentally handicapped, etc. who could probably walk but only with assistance, would be more

appropriate client groups for the recently introduced attendance allowance.

Like the trike scheme, mobility allowance was intended to assist those with walking difficulties as well as those totally unable to walk. The problem, therefore, was to define in legislative terms a test which would include this target group, numerically far larger than those who could not walk at all. The form of words decided upon was 'virtually unable to walk' (Social Security Act 1975 s.37A(1)) which was intended to bring within the scheme those people who could only move about a little. In order that this would be seen as a fair test a requirement was included that walking ability should be assessed out of doors since it was not increased mobility within the home (where household fixtures and furniture make getting about that much easier) that was the desired objective but, according to the Minister for the Disabled at the time, "to get out and about, to be physically in the community as well as members of it" (quoted in Brown, 1984, p.266). The 'virtually unable to walk' test, as will be seen later, has assumed a dominating importance in the administration of mobility allowance.

The provisions of the mobility allowance scheme are the product of developments stretching back over 50 years before its introduction in 1975. Those designing the scheme did not have carte blanche but were constrained by what had gone before and by the all-pervasive concern of Governments to limit the costs of the social security system. The result of these shaping forces is evident in the detail of the primary and secondary legislation which govern the administration of mobility allowance. This legislation is the subject of the next section.

## 2 - The Legislation

The eligibility criteria for mobility allowance are comparatively few and, on the face of it, fairly clear and comprehensible; the problems they raise will only emerge as the detail of the administration of the benefit is analysed.

Section 37A(1) of the Social Security Act 1975 sets out the fundamental test of eligibility:

"...a person who satisfies prescribed conditions as to residence or presence in Great Britain shall be entitled to a mobility allowance for any period throughout which he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so."

The Act itself did not give any indication of how 'virtually unable to walk' was to be interpreted but the position became clearer with the publication of the Mobility Allowance Regulations 1975 (SI 1975/1573), (subsequently amended by SI 1979/172). Regulation 3(1) now reads:

"A person shall only be treated ... as suffering from physical disablement such that he is either unable to walk or virtually unable to do so, if his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to place of residence or as to place of, or nature of, employment -

- (a) he is unable to walk; or
- (b) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or the length of time for which or the manner in which he can make progress on foot without severe discomfort, that he is virtually unable to walk; or
- (c) the exertion required to walk would constitute a danger to his life or would lead to a serious deterioration in his health."

Regulation 3(2) adds the qualification that a claimant's ability to walk should only be assessed taking into account any artificial aid or prosthesis which a claimant does, or could, use (such as an artificial leg, walking stick or frame, etc.). Notwithstanding regulation 3(2),

a claimant has four means of satisfying s.37A(1) by fulfilling (a), (b) or either condition of (c) in regulation 3(1).

Section 37A(2) of the Act seeks to exclude from the scheme people suffering from short-term disabilities or incapacities (such as a broken leg or sprained ankle) for whom the benefit was never intended, and those people who, though immobile, could not under any circumstances make use of a cash allowance. Thus s.37A(2) reads:

- "... a person qualifies for the allowance only if -
- (a) his inability or virtual inability to walk is likely to persist for at least 12 months from the time when a claim for the allowance is received by the Secretary of State; and
  - (b) during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion."

The residence and presence conditions referred to in s.37A(1) are prescribed more specifically in regulation 2 of the Mobility Allowance Regulations. Regulation 2(1) requires that in general a claimant must show:

- (a) that he is ordinarily resident in Great Britain; and
- (b) that he is present in Great Britain; and
- (c) that he has been present in Great Britain for a period of, or periods amounting to an aggregate to, no less than 52 weeks in the [previous] 18 months ..."

Regulation 2(3) provides some exceptions to these requirements for, inter alia, servicemen and their families, workers on the continental shelf and those temporarily absent from the country.

Section 37A(5) contains a number of age criteria that the claimant must satisfy to qualify; it reads:

- "No person shall be entitled to a mobility allowance -
- (a) in respect of a period in which he is under the age of 5 or over the age of 75
  - (aa) in respect of a period in which he is over the age of 65 but under the age of 75 unless either -

- (i) he had been entitled to a mobility allowance in respect of a period ending immediately before the date on which he attained the age of 65; or
- (ii) he would have been so entitled but for paragraph (b) below and a claim for the allowance by or in respect of him is made before the date on which he attained the age of 66;
- (b) except in prescribed cases, for any week before that in which a claim for the allowance by or in respect of him is received by the Secretary of State."

The age constraints are primarily cost-cutting provisions. Some justification may be offered for the lower age limit of 5 since it could be argued that it is reasonable for parents to take responsibility for the transport costs incurred by small children up to school age regardless of their physical capabilities. But no such rationale can be offered for the upper age restrictions; disqualifying new claimants over 65 and stopping the benefit at 75 can only act to the disadvantage of old people with mobility problems. <sup>(1)</sup>

The walking criteria, the 12-month duration test and the requirement that mobility allowance benefit the claimant are all deemed medical questions. <sup>(2)</sup> For an initial claim they are referred to an Examining Medical Practitioner (EMP) for a medical report, and should a claimant be disallowed on one of these grounds he may appeal to a Medical Board and thence to a Medical Appeal Tribunal (MAT). The age and the residence and presence conditions are questions for the lay authorities to decide, ie the adjudication officer and, on appeal, the Social Security Appeal Tribunal (SSAT).



### 3 - Some Illustrative Statistics

The number of mobility allowance recipients has grown steadily since the benefit was introduced in 1976. At the planning stage it was estimated that the probable number of beneficiaries would be in the order of 100,000, in addition to the 50,000 already benefiting from the vehicle scheme (Brown, 1984, p.268). Wary of the administrative difficulties of introducing the benefit for all age groups at once (and no doubt mindful of the costs involved) the decision was taken to phase in the benefit by age groups over the period 1976 to 1979. Nevertheless, by the time that the scheme was implemented fully the 100,000 expected ceiling had already been passed, and at the end of 1986 recipients exceeded 400,000. Table 6.1 demonstrates this inexorable rise in the number of mobility allowance recipients.

TABLE 6.1 - Number of current mobility allowance recipients at  
31st December (1976-86)

Year	Number
1976	34,444
1977	61,346
1978	79,712
1979	113,285
1980	158,267
1981	183,316
1982	224,572
1983	275,628
1984	326,697
1985	380,179
1986	435,608

Source: Social Security Statistics and Mobility Allowance Unit  
internal records

There are few published statistics on mobility allowance; the annual Social Security Statistics gives only six tables of figures, three relate to appeal rates, one to the value of the benefit since its inception, one to the cumulative number of beneficiaries (see

Table 6.1), and the last to the Vehicle Scheme. However, the Mobility Allowance Unit (MAU) itself collects a variety of statistics relating to the benefit which have been made available for this research. The remaining tables in this section are either taken directly from these internal records or computed from them.

The overall success rate of mobility allowance claimants has been calculated using the figures of awards made, cancellations (ie those no longer in receipt of the benefit for whatever reason) and disallowances (ie unsuccessful claims which fail to satisfy one of the eligibility criteria).

**TABLE 6.2 - Success and failure rates of mobility allowance claimants, 1976-1986**

	Successes <sup>(a)</sup>	(%)	Failures <sup>(b)</sup>	(%)
1976	34972	70.3	14782	29.7
1977	28689	64.9	15502	35.1
1978	21728	59.5	14806	40.6
1979	40633	66.1	20868	33.9
1980	54571	68.3	25301	31.7
1981	38717	66.7	19367	33.3
1982	56486	66.3	28673	33.7
1983	55324	59.9	37096	40.1
1984	62015	63.9	35056	36.1
1985	79170	61.1	50345	38.9
1986	84739	58.3	60676	41.7

Source: Mobility Allowance Unit internal records (1987)

(a) Successes = current awards + cancellations

(b) Failures = disallowances

Successful claimants by definition fulfil all the eligibility criteria discussed in the previous section; unsuccessful claimants however need only to fail to satisfy one of them for their claim to be rejected. Table 6.3 overleaf gives an analysis of disallowances by the reason for failure; the categories are 'age' (ie failure to satisfy s.37A(5) of the Social Security Act 1975), 'residence and presence' (s.37A(1)

and regulation 2 of the Mobility Allowance Regulations 1975), 'walking' (s.37A and regulation 3(1)), 'no benefit' (s.37A(2)(b)), and 'duration' (s.37A(2)(a)).

TABLE 6.3 - Number of disallowances per year by reason for disallowance<sup>(a)</sup> 1976-1986

	age	residence/ presence	walking	no benefit	duration
1976	4890	41	9735	42	74
1977	4732	28	10603	73	66
1978	4501	23	10157	48	77
1979	2038	38	18542	90	160
1980	(b)	23	26369	126	185
1981	390	5	18763	72	137
1982	744	61	27686	11	171
1983	1128	56	35656	15	241
1984	1348	54	32984	(b)	231
1985	9271	154	40075	58	381
1986	13941	125	45485	223	354

Source: Mobility Allowance Unit internal records (1987)

(a) Calculated from the cumulative totals for the year end.

(b) Using the method noted in (a) the figures for 'age' in 1980 and 'no benefit' in 1984 are negative. No explanation for this discrepancy can be suggested except administrative error.

These figures translated into percentages of the total disallowances for each year are revealing (Table 6.4 overleaf).

TABLE 6.4 - Disallowances as a percentage of total disallowances, 1976-86

	age	residence/ presence	walking	no benefit	duration
1976	33.1	0.3	65.9	0.3	0.5
1977	30.5	0.2	68.4	0.5	0.4
1978	30.4	0.2	68.7	0.3	0.5
1979	9.8	0.2	88.9	0.4	0.8
1980	(a)	0.1	(b)	0.5	0.7
1981	2.0	0.03	96.9	0.4	0.7
1982	2.6	0.2	96.6	0.04	0.6
1983	3.0	0.2	96.1	0.04	0.6
1984	3.8	0.2	94.1	(a)	0.7
1985	18.4	0.3	79.6	0.1	0.8
1986	23.0	0.2	75.0	0.4	0.6

Source: Mobility Allowance Unit internal records (1987)

(a) see note (b) to Table 6.3

(b) Calculated in the normal way this figure would be 104.2% which is clearly nonsense. It is the result of the discrepancy in the 'age' figure noted above.

In the early years, 1976 to 1978, there would probably have been a large number of claimants falling foul of the phasing arrangements which could well have been confusing to many of the older claimants, and this is reflected in the high percentage of disallowances on age grounds during these years. Thereafter the overwhelming importance of the walking criteria is clearly apparent even allowing for the increase in the numbers rejected on the age criteria in 1985 and 1986. (3) Disallowances because of a failure to satisfy the residence and presence, the likely benefit, and the duration of disability conditions have remained at a constant, barely significant level throughout. The figures in Table 6.4, despite the odd discrepancy, indicate the importance of the walking test in the assessment of a claimant's entitlement to mobility allowance, an importance which will be reflected in the analysis of first tier decision-making later in the chapter.

#### 4 - The Mobility Allowance Unit

The DHSS Mobility Allowance Unit at the North Fylde Central Office (NFCO) processes all mobility allowance claims made throughout Great Britain. '4' In mid-1986 the Unit employed around 375 staff organised into a number of sections, each dealing with specialised tasks. The sections of the most relevance for this study are the Claims and Payments, and Lay Scrutiny sections, and the mobility allowance medical branch known as M7.

The Claims and Payments section employed around 300 staff mostly in the clerical grades. About 10% of staff were in the Executive Officer (EO) grade employed as supervisors or adjudication officers. This section deals with the mechanics of processing the 4,000 claims that the Unit receives per week, and with the adjudication of all claims.

All mobility allowance claimants will receive a medical examination and a walking test carried out by an Examining Medical Practitioner (EMP). The Lay Scrutiny section checks all EMP medical reports for initial claims, and assesses the opinion of the EMP as to whether the medical criteria for mobility allowance are satisfied. It is a small section of only some 10 staff.

The medical branch, M7, is part of the DHSS Chief Medical Officer's organisation, not a section of the Mobility Allowance Unit itself. Its Principal Medical Officer (PMO) and his staff of Medical Officers specialise in the medical aspects of mobility allowance and, inter alia, advise, when requested, the lay personnel of the Unit. They also train and oversee the work of the EOs of Lay Scrutiny.

The remainder of the Unit comprises a number of small, specialist sections. The Reviews section deals with claims that may be subject to the review arrangements for social security benefits. It also investigates information supplied by third parties, and in this

respect acts as the fraud section of the Unit. The sixty staff of the appeals section process the 500-600 appeals that are submitted to the Unit every week. The Homes and Motability section processes multiple claims from old people's homes and hospitals, and administers the charity, Motability, which provides preferential loans for mobility allowance recipients who wish to purchase a car. There is also a small general administrative section oversees the management of the Unit, ie it issues procedures and instructions, carries out management checks and budgetary control, collects statistics etc.

The responsibility for advising the Unit on lay matters lies with the Principal Adjudication Officer (PAO) section, which serves the same purpose for NFCO that the Office of the Chief Adjudication Officer (OCAO) serves for the local offices, ie it functions as an external (and expert) source of advice and guidance. In this case, however, PAO acts as an extra tier of advice since OCAO can also be consulted when necessary. The section also carries out adjudication monitoring checks on behalf of the Chief Adjudication Officer in the same way in which Regional monitoring teams deputise for the Southampton teams.

The Mobility Allowance Unit, in the words of its Head, is "a mass processing system" and is growing larger as the rising number of claims shows no sign of levelling off. Mobility allowance is one of the cheapest benefits to administer: the administrative cost as a percentage of benefit expenditure in 1984-5 was only 2%% (compared with 8%% for unemployment benefit and 11%% for supplementary benefit), and the average weekly administrative cost per beneficiary was 50p (cf. £2.50 for unemployment benefit, and £3.05 for supplementary benefit). (5)

## Part II - THE THEORY AND PRACTICE OF MOBILITY ALLOWANCE DECISION- MAKING

### 1 - The Formal Arrangements

As mentioned earlier, the mobility allowance eligibility criteria are of two types, lay and medical, which are considered within distinct decision-making structures (although, as will be seen later, these can and do overlap).

Throughout the social security system lay questions are allocated to either the independent statutory authorities or the Secretary of State to decide; medical questions, however, are decided in a number of ways. In some cases medical practitioners will decide the question on the basis of their own examination, and their decisions will be accorded the status of legally binding decisions, ie they are adjudicating upon the medical questions (such practitioners are now referred to as Adjudicating Medical Practitioners (AMPs).<sup>(6)</sup> Alternatively, the decision may be made on the basis of a medical report supplied by a doctor to a lay or medically-qualified official of the DHSS. Such doctors may be GPs or consultants who might supply an occasional ad hoc report, or they may be specially trained and retained to furnish reports on a regular basis. In this role they are not adjudicating; since they are not deciding whether legislative criteria are being met their reports will be of an advisory nature only. Mobility allowance employs a slightly unusual combination of approaches.

An Examining Medical Practitioner (EMP), specially trained, sends a medical report which includes an opinion of whether the mobility allowance legislation is satisfied. The report is advisory only but EMPs have to, in forming their opinions, go through the process of



adjudication even though in a formal sense this is reserved for the adjudication officer. '7'

Each Region recruits and maintains a panel of doctors, usually active or retired GPs, to act as EMPs. They are trained to make mobility allowance assessments by Medical Officers from the Regional Office. Initially, their reports were scrutinised by the Medical Officers of M7 at NFCO and a recommendation of the appropriate decision passed to an adjudication officer who, as the independent statutory authority, would make the final, legal decision on the claim. This task is now undertaken, under M7 supervision, by the Lay Scrutiny section. The decisions on the lay questions concerning age and residence and presence are taken by the adjudication officer alone.

If a claimant is disallowed for failure to satisfy one of the lay questions he can appeal in the normal way to a SSAT and thence, on a point of law, to the Social Security Commissioner. On the medical questions, however, an appeal against an adjudication officer's decision is not heard in the first instance by an MAT but by a Medical Board comprising two doctors appointed by the Regional Medical Officer; only if a further appeal is made will the case be heard by an MAT. On these medical questions the MAT is the final arbiter; the Commissioner will only hear cases from aggrieved claimants on a point of law. The medical appeals hierarchy for mobility allowance is unusual, having in effect two levels of appeal; for other benefits, appeal is to the MAT directly. '8'

Whilst it is unusual, the system has several advantages; for the DHSS the two-man Medical Board is considerably cheaper than an MAT consisting of three more highly-qualified members (whose fees are higher), and for the claimant there is an extra opportunity of getting the decision of an adjudication officer reversed. The effectiveness of the Boards in restricting the need to convene an MAT can be demonstrated by comparing their respective workloads.

TABLE 6.5 - Cases referred to Medical Boards and MATs, 1980-1985

	referred to Medical Boards	referred to MATs
1980	9069	2605
1981	8384	2859
1982	13435	3362
1983	15149	3701
1984	16189	4901
1985	18368	5694

Source: Mobility Allowance Unit internal records (1986)

A disadvantage of this arrangement for claimants is that they are not afforded the same rights (to see casepapers, to be represented etc.) before a board as they are before an MAT.

#### (a) The Claiming Process

A claim for mobility allowance is made on the prescribed form (the MY1). At the Mobility Allowance Unit the claim is checked by a clerical officer of the Claims and Payments section to ensure that it has been completed fully. The age and residence and presence conditions are then considered using the information provided by the claimant. If either of these conditions is not satisfied the claim is rejected and the claimant notified, but as Tables 6.3 and 6.4 show, this is rare. In the vast majority of cases the next step is to obtain a report from an EMP.

The medical examination and walking test<sup>(9)</sup> are arranged via the appropriate Regional Office, whose Medical Boarding section will arrange for the claimant either to attend an EMP at his or her surgery or a Medical Boarding Centre, or where necessary, for the EMP to visit the claimant at home. The medical report form (the MY22) is completed and returned via the Regional Office to the Mobility Allowance Unit. Here, the Lay Scrutiny section will examine the reports. Problem

cases are referred to the Medical Officers in M7 for advice, <sup>(10)</sup> otherwise an Executive Officer will consider whether or not the medical conditions are satisfied by the claimant, and append his or her own assessment.

The adjudication officer will eventually receive all the papers with a recommendation from Lay Scrutiny (endorsed where appropriate by M7) to allow or disallow the claim, or a suggestion that the case should be referred to a Medical Board. Accordingly the claimant will receive notification of the result of his claim or notice that he will be required to attend before a Board. The claiming process can be represented in the diagram overleaf.

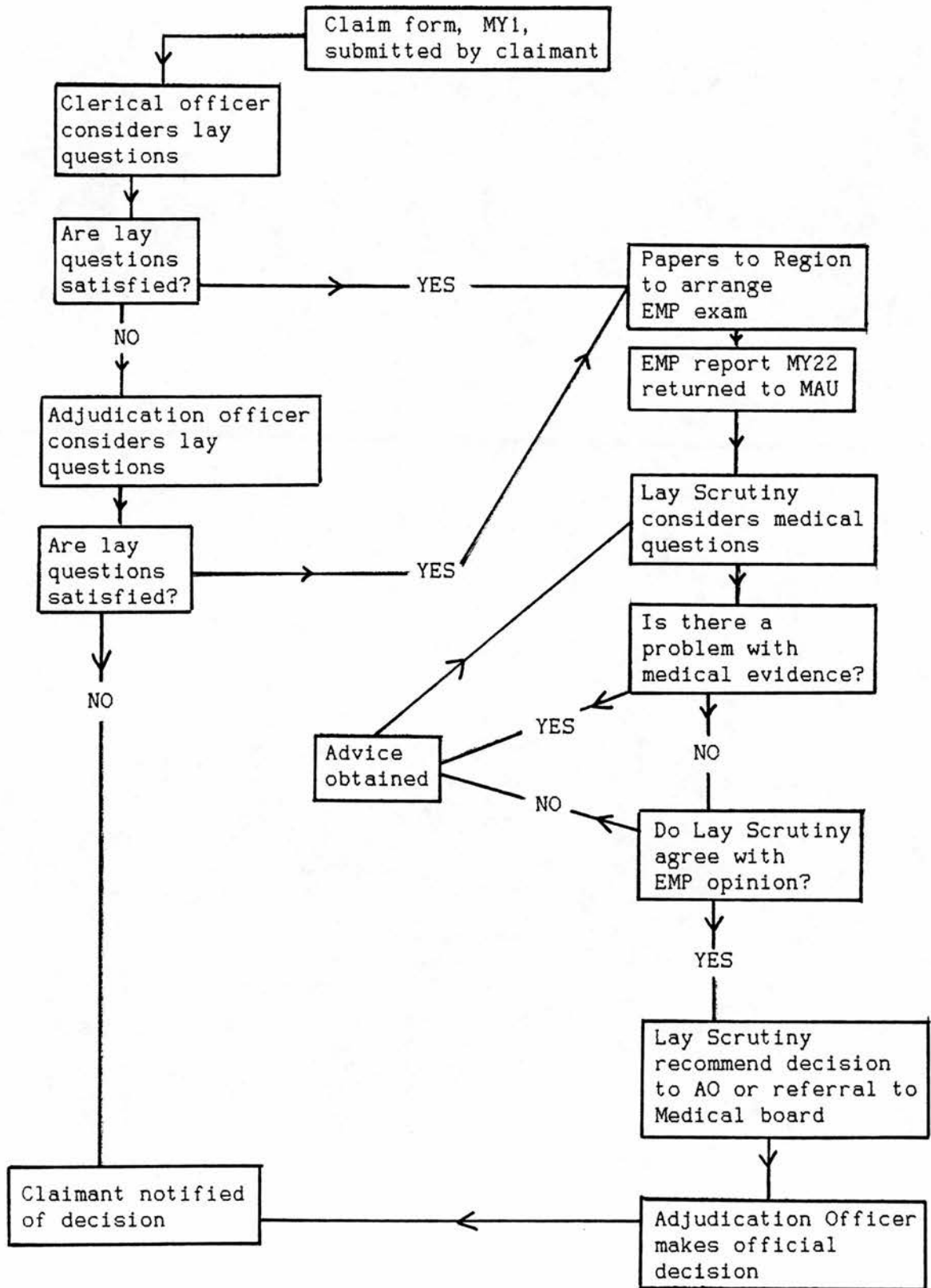


FIGURE 6.1 - The mobility allowance decision-making process

## 2 - Decision-making in practice - the medical questions

As mentioned earlier, the medical questions (ie whether the claimant is unable or virtually unable to walk, whether the physical condition causing walking difficulties will last at least 12 months, and whether the claimant can benefit from enhanced facilities for locomotion) are decided by lay adjudication officers on the basis of the medical report form MY22 (vetted by Lay Scrutiny and possibly M7) provided by an EMP. This section will draw upon the empirical data obtained during visits to 16 EMPs in 5 different locations in Scotland and England''' and to the Mobility Allowance Unit to examine how the medical questions are decided in practice.

### (a) The medical examination

The raw material, and usually the only material, of mobility allowance decision-making is the report of the EMP. Its four parts are designed to elicit all the information necessary for the medical questions to be answered, and its format dictates how the medical examination is performed. Part 1, completed in the Mobility Allowance Unit, simply records relevant personal details of the claimant. Part 2, which is completed by the EMP, gives an opportunity to claimants to make a statement about their medical history and an assessment of their walking ability. Part 3 comprises the clinical findings of the EMP and a record of the claimant's performance in the walking test. Part 4 requires the EMP to express an opinion on whether or not the statutory conditions are satisfied.

Of these four parts, it is part 3 which assumes the most significance in the decision-making of EMPs and, later, of the staff of Lay Scrutiny. The questions in this part pertaining to walking are clearly derived from the Mobility Allowance Regulations (particularly regulation 3(1)(b) and (c)) which seek to clarify how 'virtual inability' to walk should be assessed. They require information on

distance covered, speed, manner of walking, gait, balance, time taken, and the extent of any assistance required. The responses of EMPs displayed a large degree of consensus about how a walking test should be conducted. <sup>(12)</sup>

"We always say that we would like to see them outside because that it is what we are expected to do, but we are not asking them to do that if they feel unable to. If they are able, I ask them to walk the length of the car park, so by the time they have walked the corridor and up and down the stairs, it is at least 100 yards." (EMP, Region #2)

"I get claimants to walk along the corridor, that's about 45 yards, up the flight of stairs at the end, and back again. That's a good 100 yards." (EMP, Region #3)

"If I'm at my surgery or making a visit, I always ask them to walk 100 yards outside, on the level ground. At the Boarding Centre, there's a set route of 120 yards along the corridors, there's no real need to go outside." (EMP, Region #1)

These responses are from EMPs in three different parts of the country and illustrate that 100 yards is widely adopted as an appropriate distance for the walking test. The reason for this was simply that in making their assessment of a claimant's walking ability, the Department advises EMPs that 100 yards is an appropriate distance to consider.

"There isn't a distance laid down, but the advice from the Ministry is round about 100 yards on the flat." (EMP, Region #2)

How the 100 yards criterion emerged will be discussed in Part III. It is a crude guideline but one which has clearly registered with the vast majority of EMPs,

"... we all recognise 100 yards." (EMP, Region #3)

"100 yards is not in the legislation but it is in our heads." (EMP, Region #1)

Although 14 of the 15 EMPs who responded made reference to the 100 yards test they did not necessarily adhere to it in practice. The distance was treated more as a useful first step in the assessment of walking ability. If claimants can walk, say, only 20 or 30 yards before they are forced to abandon the attempt they are usually considered virtually unable to walk without any further investigation being considered necessary. Those reaching 150, or 200, yards and beyond, however, will only be considered virtually unable to walk if one of the more qualitative factors mentioned in regulation 3(1)(b) indicates that the quality of walking is sufficiently poor to offset the distance that can be managed. EMPs were clear that distance was not the only consideration in their assessment.

"It's not just distance, it's the method and action of walking, and the effect of walking on pain and breathlessness. You have to put all these things together to make up your mind." (EMP, Region #3)

For example, if the speed of walking is particularly slow or the claimant has to make numerous stops before continuing or if his or her gait renders progress difficult (as it does for conditions such as spina bifida) then regardless of the distance covered the claimant may still qualify. Similarly, if walking can only be achieved in severe discomfort, the claimant may still be classed as virtually unable to walk.

Although there was a degree of conformity about the appropriate length for a walking test, there was a surprising, and disturbing, lack of agreement about where it should be conducted. The legislation (in regulation 3(1)(b) of the Mobility Allowance Regulations) clearly states that it is the claimant's 'ability to walk out of doors' which is at issue in deciding 'virtually unable to walk'. Only a few EMPs were clear about what was required of them,

"... you must take them outside, that is essential." (EMP, Region #1)



"Yes, I always give an outdoor walking test; I go out with them in all sorts of conditions." (EMP, Region #3)

Several more would attempt an outdoor test, but if there were any problems, readily reverted to indoor tests (see, for example, the quotation on p.258).

"I prefer to go outside, but many of the claimants live in high rise flats, so I get them to walk around the room and use any stairs." (EMP, Region #1)

Outdoor walking tests were most frequently dispensed with when the EMP examined the claimant at a Medical Boarding Centre.

"We always use the same standard run at this Centre - along the corridor, up the stairs and back, which is about 120 yards." (EMP, Region #2)

"There's no need to go outside here; we have good long corridors which serve our purpose adequately." (EMP, Region #2)

This tendency to conduct tests indoors not only introduces a lack of consistency in the treatment of claimants but also offends against the intention of the legislation. The wording of the regulation (according to one informant closely involved with the drafting of the Regulations) was a deliberate attempt to differentiate between people's ability to manoeuvre themselves around the familiar territory of their own homes, which may be relatively easy with the confidence that is derived from an intimate knowledge of one's immediate surroundings, such as where safe handholds are available, and the ability to get about out of doors where such assistance is unlikely to be available and consequently where confidence may be lacking. Although not at all representative of the whole sample, one EMP's comment indicated a disturbingly poor grasp of the mobility allowance legislation and its intentions.

"This Boarding Centre is a good place for carrying out walking tests; the corridors are long enough so we don't

have to go outdoors, and there are plenty of handholds to hang on to." (EMP, Region #3)

Part 4 of the medical report asks the EMP, in language taken almost word for word from the legislation, to give an opinion of whether or not the medical criteria are satisfied. The EMP is not being asked to adjudicate in the formal sense of making a legally valid decision on a claim, but in effect he is doing nothing different had he, and not the adjudication officer at the Mobility Allowance Unit, been the independent statutory authority. And the point is further reinforced by the fact that, at the first level of appeal, the Medical Board doctors, who are the independent statutory authority, 'are almost invariably EMPs as well and must address exactly the same questions in deciding a claim as the EMP does in forming an opinion. The process that the EMP goes through in completing part 4 is therefore impossible to distinguish from adjudication in anything but name.

The claimant who is totally unable to walk (and hence satisfies s.37A(1) immediately) is, thankfully, a comparatively rare individual. Far more numerous are the claimants who can attempt a walking test and must therefore aim to qualify under the 'virtually unable to walk' condition. Regulation 3(1)(b) clearly intends that the test for satisfying this condition should be based on both a quantitative and qualitative assessment of walking ability but, beyond that, the primary and secondary legislation is of little help to EMPs in forming their opinions.

Usually an overall picture of the claimant's walking ability can be formed when part 3 has been completed. However, this does not necessarily ease the problem of deciding whether the virtually unable to walk condition is satisfied. Most EMPs professed to having some, occasionally considerable, difficulty with the phrase.

"One claimant said in his statement that he could walk only fifty yards or so before he had to stop. When I went outside to watch him, he walked down the street and stopped

at the road for some traffic, but not for any other reason. He then went on and crossed the road by the island and down the other side of the road, a total of about 175 yards, which he did without stopping except to wait for traffic. Well, that obviously is not 'virtually unable to walk'. If he had stopped every 20 or 25 yards, then had to go on slowly, and then slower and slower, even if he could only manage 100 yards, you would have to think very carefully about whether he was 'virtually unable to walk' or not. It is a very difficult decision to make, and I find that it doesn't get any easier." (EMP, Region #1)

"... it is almost like saying how long is a piece of string; but I think it is down to clinical experience. 'Virtually unable to walk' defies definition; what is needed is clinical judgement." (EMP, Region #3)

"We have extreme difficulty interpreting 'virtually unable to walk'. You can't define 'virtually' so it is left to personal interpretation." (EMP, Region #2)

The following précis of a typical case further illustrates the problem.

**Case #1 - A common problem of 'virtually unable to walk'**

On her walking test a 55-year old woman walked 'normally' (for a 55-year old) for about 70 yards before rapidly becoming breathless (she was a chronic bronchitic). Progress then became 'laboured' and by the time she had completed the 120-yard standard run, she needed to rest for about five minutes before she felt able to exert herself further. The problem for the EMP was whether her ability to walk 120 yards excluded her or whether the manner of her progress over the final 50 yards was of a sufficiently poor quality to bring her within the meaning of 'virtually unable to walk'. The EMP also thought that had she walked at a slower pace initially she could have walked longer and further.

Nevertheless, the unwritten 100 yards rule does inject a degree of uniformity of treatment in initial assessments.<sup>(13)</sup> And this is

extended to the Medical Boards since, as noted earlier, almost invariably (and this study found only one exception) a Medical Board member also acts as an EMP, though not on the same cases.

In contrast to the problems caused by 'virtually unable to walk' the 'duration' and 'likely benefit' conditions are relatively straightforward. Making an assessment of the likely length of time that a claimant's illness or disability will continue is very little, if at all, different from the routine medical practice of making a prognosis of the likely development of the claimant's illness or disease.

"... deciding how long someone's incapacity will last is pretty straightforward, routine medical judgement." (EMP, Region #2)

Nevertheless, the assessment is important since mobility allowance is only payable during the time that the medical conditions are satisfied. (For example, if a claimant regains the ability to walk after a hip replacement operation he or she will cease to be eligible for the benefit.) The adjudication officer therefore can make an award for any length of time over 12 months up to age 75.

Deciding whether a claimant can benefit from 'enhanced facilities for locomotion' rarely presents any problem. The occasional difficulty does arise with severely mentally handicapped persons who have little awareness of their surroundings; but even here there is usually a presumption that a change in surroundings once in a while can only enhance the admittedly poor quality of life that such patients endure. <sup>(14)</sup>

"... practically everyone could benefit if they received the benefit, it's only a problem for some extremely severely mentally handicapped patients who have absolutely no idea of where they are or what is going on." (EMP, Region #1)

In completing the MY22 medical report form, EMPs are operating on two distinct levels. They are firstly acting purely as medical

practitioners using the techniques and practices of medical decision-making about diagnosis and prognosis that are derived from a profession-based decision-making system (they are of course not required to consider a professional response to the claimant's condition). This process of diagnosis provides part of the evidence upon which a claim for mobility allowance will be decided. Secondly, they are acting as quasi-adjudicators in applying the decision criteria of the mobility allowance legislation to the evidence they have collected in order to provide their opinions in part 4 of the medical report. And on the 'duration' question the two roles are combined since their diagnoses and prognoses as medical practitioners effectively determine the answer to the question (for example, if a claimant's heart condition is expected to incapacitate him or her for two or three years, then the application of the statutory decision criteria in s.37A(2)(a) of the 1975 Act is a formality).

#### **(b) Lay Scrutiny**

As mentioned earlier, the Lay Scrutiny section is a recent innovation<sup>'15'</sup> relieving the Medical Officers in M7 of the task of checking and scrutinising the medical reports from EMPs. In effect, they are offering the adjudication officer (who will make the final, legal decision on a claim) a second opinion regarding the medical questions.<sup>'16'</sup> In the first eight months for which figures were available (ie to May 1986) over 73,000 first claims were processed.

The common practice amongst the Lay Scrutiny Executive Officers (EOs) was to read and digest the record of the claimant's statement and the clinical findings (including the walking test), ie parts 2 and 3 of the MY22. Without reading the EMP's opinion, they came to their own assessment of whether the claimant was virtually unable to walk and, where appropriate, the length of the award. The consideration of the 'virtually unable to walk' test was similar to that of the EMPs. Distance (100 yards) was again mentioned as an important indicator but

the overall picture built up by the information in parts 2 and 3 determined their assessment. As one remarked,

"You consider the claimant's statement, the physical diagnosis - especially any abnormal conditions - the claimant's age, and then distance, speed, and time taken for walking, plus any remarks concerning the gait and balance of the claimant and any pain experienced; you get the feel of it as you go along. Coming to a decision is really intuition based on facts." (Lay Scrutiny EO)

However, giving an opinion on whether the 'duration' condition was satisfied, and deciding the length of award was difficult for lay scrutineers who were being asked in effect to comment where they are not competent. In practice, the EO is supplied with a guidance document prepared by M7 giving a list of the commoner disabilities and illnesses which impair walking ability, and a suggestion of how long such an impairment can generally be expected to continue. The introductory paragraph to the document reads:

"These notes are intended as a GUIDE for lay scrutineers on the period for which the medical conditions for mobility allowance are likely to be satisfied. They must not be used as authoritative instructions and each case must be treated on its individual merits."

However, without medical training it is difficult to see how Lay Scrutiny can form an opinion on these questions other than that suggested by the guidance despite this insistence from M7 that the EO is free to judge for himself.

"There's nothing much for us to do here - we just go along with the doctor's prognosis and trust his knowledge." (Lay Scrutiny EO)

"The only problem on 'duration' is when someone is on a waiting list for, say, a replacement hip. Eventually they'll improve but only after the operation. So it's difficult to judge how long payment should last." (Lay Scrutiny EO)



Having made his or her assessment the EO can compare it with the opinion of the EMP. Four outcomes are possible. If the two opinions agree, either to allow or disallow, then the case is referred to the adjudication officer with that recommendation. If the EMP advises disallowance but Lay Scrutiny disagree then the case is referred to M7 for their assessment; if M7 endorse the Lay Scrutiny interpretation then a recommendation goes forward to the adjudication officer to allow the claim and to ignore the opinion of the EMP. If, on the other hand, Lay Scrutiny see disallowance as the correct decision contrary to the EMP's report then, with M7's endorsement, the case is referred to a Medical Board to make the initial decision. (17) Similarly, if Lay Scrutiny think the EMP assessment of the length of award is inappropriate they will consult M7, after which a recommendation will go forward to the adjudication officer for a longer award or the case will be referred to a Medical Board if a shorter award is considered more accurate. In the first eight months 2,378 claims (3.3% of those received) were referred to a Medical Board.

The introduction of lay scrutiny has so far proved successful. EMP medical reports are processed more quickly and more cheaply, and the standards of decision-making (according to the Senior Medical Officer who heads M7 and who monitors Lay Scrutiny assessments) are as good as, and possibly even better than the part-time Medical Officers used to achieve. Unfortunately, although Lay Scrutiny was considered a success, there were also its critics,

"I wouldn't want to do this for long. It's monotonous work and very narrow. I'm afraid that Lay Scrutiny is menial, tiresome and boring." (Lay Scrutiny EO)



### 3 - Decision-making in practice - the lay questions

Adjudication officers, despite their formal, legal responsibility for making decisions on mobility allowance claims play only a minor role in practice. Of the eligibility criteria, they consider the age of the claimant and the residence and presence conditions (but not necessarily in all cases). The age conditions are so clear cut that they virtually never cause difficulty.

As with much of social security policy there is an intention that mobility allowance should only benefit those who live in Great Britain. There are, therefore, provisions common to many benefits which utilise the concepts of 'residence' and 'presence'. The first of these is sometimes qualified slightly (as it is with mobility allowance) by using the term 'ordinarily resident' to imply some continuity of residence. Since these common provisions exist, case-law from one benefit has been considered to apply equally to all benefits. Hence, of all the mobility allowance eligibility criteria 'residence and presence' is the most developed by case-law. The problems that arise, therefore, are more frequently due to the evidence (it may be incomplete or contradictory in some way) than with difficulties in the interpretation of the law.

"Problems do arise occasionally with claims from immigrants where it is not clear exactly where they have been living in the past eighteen months. Getting the information can be difficult but you have to persevere." (Adjudication Officer)

The residence and presence conditions are not considered initially by an adjudication officer but by the clerical officer who first received the claim. A decision will be based primarily on the information provided by the claimant on the initial claim form. In the vast majority of cases there is no difficulty in deciding in the claimant's favour and rejection on this ground is rare. (Table 6.4 shows that

failure to satisfy the residence and presence conditions accounts for only 0.2% of disallowances or roughly 1 in 2000 claims.)

When there is any indication that regulation 2(1) may not be fulfilled the case is referred to the adjudication officer who will usually seek information from the claimant on his or her whereabouts over the preceding 18 months and an indication as to future residence plans. The question is largely one of fact and degree; the law is clear but the evidence may need clarification; when that is done the decision becomes simpler.

### Part III - THE DEMANDS OF ADMINISTRATIVE JUSTICE

One of the ways in which mobility allowance differs from industrial disablement benefit decision-making is that, at the level of the initial decision, no medical adjudication, comparable to AMPs making legally binding decisions, takes place. Instead, decisions on the medical questions arise jointly out of medical advice, lay opinion and finally, lay adjudication. Because of this unusual arrangement, and because the satisfaction of the medical conditions is the most difficult hurdle for claimants to overcome, analyses of the demands of administrative justice will combine discussion of the contribution of both medical and lay officials.

#### 1 - Accuracy

##### (a) The Official Verdict

Included in the first Annual Report of the Chief Adjudication Officer (DHSS, 1985e) is a summary of the results of the monitoring system for mobility allowance decision-making. Standards are assessed using the usual technique of recording an 'adjudication comment' when some deficiency in the adjudication process is discovered. Table 6.6 overleaf is an extract from this summary and shows the number of 'comments' raised in relation to the main eligibility criteria for mobility allowance.

TABLE 6.6 - OCAO analysis of mobility allowance adjudication decisions

	Age	Medical <sup>(a)</sup> Conditions	Residence & Presence
Number of cases examined	9	58	30
Insufficient evidence on which to consider the questions	0	1	0
If sufficient evidence this did not justify decision	0	1	1
Wrong model decision used	0	1	0
Decision incomplete	0	3	0
Comments per 100 decisions examined <sup>(b)</sup>	0	10	3

Source: First Annual Report of the CAO (DHSS, 1985e, p.105)

- (a) Unfortunately the CAO report does not differentiate between the medical criteria (virtually unable to walk, duration, and likely benefit) but subsumes them under the heading 'medical conditions'.
- (b) this is not strictly a percentage error rate since more than one comment can be raised on a single case.

The full analyses in the OCAO report includes the number of adjudication comments on, for example, decisions about late claims and reviewed decisions and give an overall error rate of 9 per 100 decisions examined. Unfortunately, the second OCAO report (DHSS, 1986c) does not include a comparable analysis to that in Table 6.6 above, but does give an overall error rate for all decisions of 7 per 100 decisions examined.

The picture to emerge from Table 6.6 is that the standard of adjudication on initial decisions is very high. Furthermore, if we exclude what have been argued (see chapter 5, p.187) to be 'technical deficiencies' (ie 'wrong model decision used' and 'decision incomplete') the aggregated error rate for the main eligibility

criteria falls to only 3 per 100. Nevertheless, it is possible to examine more closely the decision-making process using the analysis suggested in Figure 2.8 (see chapter 2, p.71), ie the relationship between the evidence and the decision criteria, and to suggest that, despite the satisfactory picture painted by the CAO report, there are elements within the mobility allowance administrative structure that render accurate decision-making problematic. I will therefore examine the 'evidence' side of the decision-making equation first and follow with a similar treatment of the decision criteria.

#### **(b) An Alternative Analysis**

The evidence for the age criteria comprises the statement by the claimant in the MY1 claim form which is checked against National Insurance records held at the Newcastle Central Office. It is as straightforward as decision-making can possibly be; notwithstanding the rare discrepancy, deciding the age question falls almost entirely within box (1) of Figure 2.8. The residence and presence conditions may demand additional information to that on the MY1 but again the question to be decided is primarily one of fact and degree. The evidence for the medical questions, in contrast, is almost entirely medical in character (even allowing that a lay person could probably supply some of it) and a matter of routine for a doctor, ie the clinical data and the description of walking ability require no specialised knowledge of social security legislation; the doctor merely gives answers to specific questions on the MY22 medical report form for which medical knowledge is in part essential. In most cases therefore, there is little likelihood that the evidence requirements of the medical questions will prove problematic. Unlike industrial disablement benefit there is very little likelihood of the evidence being incomplete or there being contradictory information to consider. Exceptions to this might be if a claimant supplied the adjudication officer with a statement from his or her own GP with which the EMP report does not concur, or where the claimant's statement (in part 2

of the MY22) contradicts the clinical findings. But such cases are not common.

The only reservation expressed by EMPs about the quality of the information that they collected related to the reliability of the walking test as an indicator of general ability to walk. As one explained,

"There's no doubt that with some conditions, such as arthritis, patients can have 'good' and 'bad' days. It's sometimes difficult to know the true extent of a claimant's ability, but on the other hand, you've got to accept what you see." (EMP, Region #2)

On the medical questions, therefore, problems fall mainly within box (3); problems within box (2) (and therefore also box (4)) rarely arise.

Turning to the decision criteria the position is similar for most of the questions to be decided, ie all but two are relatively straightforward. The age criteria are the clearest; there can be no misunderstanding as to their meaning. The residence and presence conditions do require the adjudication officer to know what is meant by the terms 'ordinarily resident' and 'presence' but there is now a large body of case-law which has clarified these terms to a great extent. Of the medical questions the '12 month' rule and the 'duration' condition are also relatively straightforward requiring from the EMP only the routine medical practice of forming a prognosis, ie in predicting the course of a claimant's illness or disability he will come to an assessment of how long the condition will last. So, as mentioned earlier, in giving the evidence to answer these questions the EMP is in effect also providing the answer. Of the other medical criteria consideration of whether walking might damage the claimant's health and the 'likely benefit' condition is reasonably straightforward for a medical practitioner to answer. Assessing how a patient might benefit from a particular course of treatment (or whether its

effect will be detrimental) is an integral part of medical decision-making, extending this to considering if a patient would benefit from increased increased mobility is not a difficult step. However, the final medical conditions relate to walking ability and raise several problems.

Firstly, not all those with walking difficulties will be considered eligible for mobility allowance. There is one important qualification in s.37A(1) of the 1975 Act (and reiterated in regulation 3 of the Mobility Allowance Regulations 1975) that inability or virtual inability to walk must be due to a physical disablement. This provides a separate hurdle to be overcome but it is generally a point of law rather than of fact; the medical evidence for deciding the question will be the diagnosis of the claimant's condition that affects walking ability (which the EMP is required to answer specifically in part 3 of the medical report), and as such will be a matter of routine medical practice for the EMP. The problem arises in a small, but increasing, number of cases involving mental handicap and mental illness where there may be an underlying physical cause to the disability. The paradigm example here is Downs Syndrome or mongolism, a condition which is caused by a genetic defect but which manifests itself as a mental handicap. (Hence, the position arises where a Downs Syndrome child, though physically capable of putting one foot in front the other, may frequently refuse to do so.) The question therefore arose of whether Downs Syndrome was a mental condition or whether a genetic defect was the ultimate physical cause of the disability. Subsequently regulation 3 was amended by the Mobility Allowance Amendment Regulations (SI 1979 No. 172) such that claimant's 'physical condition as a whole' should be considered in the virtually unable to walk test. Ogus and Barendt (1982, p.183) speculate that,

"It may have been the intention, by employing this wording, to admit cases, such as mongolism, where a mental blockage, itself the result of a physical condition, inhibits walking, but the matter must remain in doubt until an authoritative ruling is received from the Commissioner."



As yet there has been no such authoritative statement, but the current practice is that Downs Syndrome cases are not disallowed under s.37A(1) on this ground alone. Some conditions however clearly fall outside the scope of s.37A(1), for example agoraphobia.<sup>(18)</sup> What has happened in effect is that where the statute law, as it frequently does, leaves an area of indecision (the 'hole in the doughnut') and case-law has failed (so far) to fill it, then other decision criteria have been adopted by necessity in order that individual decisions can be made. In this instance the decision criteria are derived primarily from non-adjudicatory staff of the DHSS (ie the medical and policy branches); EMPs and adjudication officers (and Lay Scrutiny EOs) have needed advice on how to deal with these cases and in the absence of any emanating from the CAO (or rather his predecessors) have accepted the interpretation (which is in essence a policy decision) of their superiors within the organisational hierarchy.

The phrase which causes most problems for the adjudicating authorities is the interpretation of the phrase 'virtually unable to walk'. The problem is perhaps a little unusual in that the legislation, and especially regulation 3, is quite clear about what factors are to be considered, ie distance, length of time, speed, and manner of walking. However, these have not been elaborated further by case-law. That case-law is very scarce (and not very helpful) in relation to 'virtually unable to walk' is partly because it is specified as a medical question and therefore for the medical authorities to decide, ie the MAT is in practice the final arbiter of these questions; the legislation will only allow a further appeal on a point of law.

Commissioner's decisions R(M) 1/78 and R(M) 1/83 both included a consideration of 'virtually unable to walk'. In R(M) 1/83 the claimant's counsel attempted to introduce some degree of quantification of the phrase arguing,

"... the expression 'virtually unable to walk' is ambiguous. The regulations did not state the amount or quality of a person's ability to walk."

Counsel further argued that the regulations should be understood to mean:

"... an ability to walk ¼ mile, or something of that order, to enable a person to walk to the shops or to a bus stop and so carry on a normal life." (para. 9)

But the Commissioner was not persuaded:

"I shall not attempt a comprehensive definition of the words in the regulation as I consider it undesirable to do so. Whether a person is 'unable to walk' must always be a question of fact and degree." (para. 10)

"Further, I agree with the meaning given to 'virtually unable to walk' in ... R(M) 1/78 as unable to walk to any appreciable extent or practically unable to walk." (para. 12)

Despite these attempts it is hard to see how the phrase 'virtually unable to walk' is clarified in any way; walking 'to an appreciable extent' or being 'practically unable to walk' are merely restatements of the original ambiguous term. In R(M) 1/83 counsel was trying (unsuccessfully) to ensure that environmental factors (shopping, for instance) were included in the assessment of walking ability. A similar attempt was the subject of a series of Commissioner's decisions which considered whether the purpose of walking should be relevant. Following two decisions<sup>(19)</sup> which decided that an inability to get from one place to a desired destination should be a consideration, a Tribunal of Commissioners reversed this interpretation arguing that to consider whether the claimant could orientate herself spatially was adding a further test to the regulations and, therefore, could not be taken into account (an interpretation later upheld by the Court of Appeal and the House of Lords).<sup>(20)</sup>

The troubled history of 'virtually unable to walk' continued in 1986 with the publication of the Commissioner's decision, R(M) 3/86, which concerned a child with severe behavioural problems (see Logie, 1987). A Tribunal of Commissioners ruled that brain damage at birth was a physical disability and that, therefore, the child's behaviour fell within the scope of regulation 3(1) of the 1975 Mobility Allowance Regulations. However, in referring the case to an MAT for re-hearing, they emphasised that care should be taken to distinguish between a claimant who cannot walk and one who will not walk, since making a conscious decision to stop walking should not be construed as 'virtually unable to walk'.

To use the doughnut metaphor once more there is a large space contained within the outer rings of the legislation which case-law is only slowly filling. The resulting 'policy space' however has been narrowed but primarily by Departmental officials not by elements of the independent adjudication structure. The reasons for this are largely to do with the particular decision-making arrangements of mobility allowance since 1976. A little more history is therefore necessary.

#### **(c) The emergence of 'non-legal' decision criteria**

Mobility allowance decision-making relies heavily on the medical report of the EMP. That this report is entirely advisory and the EMP not part of the formal adjudication structure has important consequences. As a principle it is accepted by the DHSS that the independent statutory authorities must be allowed to make their decisions free from outside influences, especially from the Department itself, in order to maintain impartiality. Hence, the Department will not advise them on the interpretation of legislation. However, the principle does not apply in theory to the EMP whom the DHSS is free to advise in the same way that it is free to advise any party supplying information in connection with a social security claim. Before the

implementation of mobility allowance in 1976 there was an expectation within the DHSS that EMPs would immediately require advice on how to interpret 'virtually unable to walk'. Hence, before the first enquiries arrived the Chief Medical Officer at the time was prepared with some guidance. It is from this advice that the unofficial 100 yards test emerged, in effect quantifying one aspect of the Mobility Allowance Regulations. The choice of 100 yards was by no means arbitrary. One of the eligibility criteria for qualifying for an invalid carriage under the old vehicle scheme was based on an assessment of the claimant's walking ability over 100 yards, and so since existing vehicle drivers would be automatically entitled to the new mobility allowance without having to satisfy the new conditions, it was thought equitable that new claimants should only have to satisfy a comparable, not harsher, test. It was a crucial decision which has had a fundamental influence on how the 'virtually unable to walk' has since been viewed at the front line. Experienced EMPs recount how the 'advice' gradually spread from NFCO Medical Officers, in response to enquiries from individual EMPs and Medical Officers in Regional Offices, to the rest of the EMPs by word of mouth. (21)

From the responses of the EMPs cited earlier, it seems that the status of the 100 yards criterion hovers uneasily between 'guidance' and 'instruction', even though it is also clear that other factors, such as speed and manner of walking, are actively considered. The 100 yards criterion has effectively filled a large part of the 'policy space' left by the legislation. And because the 'virtually unable to walk' condition is a medical question this unwritten rule has become virtually immune to challenge outside the structure of medical adjudication. Certainly within this structure, the claimant can appeal against the opinion of the EMP (though legally the decision of the adjudication officer) to the Medical Board, but since the Boards consist of doctors who are almost invariably EMPs as well, the 100 yards rule is influential at this level also. This level of consistency could be seen as an advantage of the present arrangements,

but it is only a fortuitous result of policy decisions chiefly concerned with the speedy and cheap processing of appeals. And there the consistency ends, since the final arbiters of medical questions, Medical Appeal Tribunals, comprise individuals unconnected with the rest of the mobility allowance decision-making structure. (22)

A further doubt regarding the level of accuracy implied in the OCAO report arises from a small-scale study designed to quantify the walking ability (in terms of distance and time) of mobility allowance recipients (Hunter, 1986). The conclusion was drawn that:

"The wide scatter of results confirms the variability of assessments... It is impossible to set a limiting value for any parameter but the likelihood of an applicant being successful increases as distance, time and speed decreases."

The 'wide scatter of results' mentioned refers to the distances that recipients could walk; some could manage as far as 900 metres (about three-quarters of a mile) whilst others failed at around 10 metres. Speed of walking varied between 1.2 metres per second (about 2½ miles per hour) and less than 0.1 metres per second. (Walking speed for a normal adult is between 3 and 4 miles per hour.) Surprising though it is that someone who can walk three-quarters of a mile can qualify for mobility allowance, more interesting is the median value for distance covered: 120 metres, indicating that over a half of the sample could walk over the 100 yards that serves as the reference point (and frequently the cut-off point) for most EMPs in their deliberations of 'virtually unable to walk'.

This discussion of 'accuracy' in relation to 'virtually unable to walk' has, so far, attempted to show how the concept of accuracy is difficult to apply to a part of the legislation that leaves a large 'policy space'. As experience has shown the legislative decision criteria make it very difficult to come to any decision at all except perhaps where the word 'virtually' is applied in a common sense way to people who can only manage a few steps. What has made decision-making

possible in the vast majority of claims where this is not the case is the adoption of decision criteria based on a quantified idea of distance.

#### **(d) Promoting accuracy in the decision-making system**

In chapter 3, four elements of the decision-making system were noted which contribute directly or indirectly to the promotion of accuracy in decision-making; training, advice, monitoring, and the appeals hierarchy. This section will examine their contribution in practice.

##### Training

Training for new EMPs is undertaken by the appropriate Regional Office, often simultaneously with industrial disablement benefit training, since most medical practitioners recruited as AMPs also agree to carry out mobility allowance assessments. Each EMP receives a copy of the DHSS publication 'Notes for Medical Practitioners', which gives guidance on each of the medical questions that need to be addressed and provides advice on the completion of the medical report form. In addition, the Senior Medical Officer or one of his staff will visit the new EMP to explain the legislation and what is required during the medical examination of the claimant. After that, and in contrast to the practice of 'sitting in' with an experienced AMP on industrial disablement benefit boards, the EMP is on his or her own and will be sent claimants to assess by the Regional Office Medical Boarding section. The 'Notes for Medical Practitioners' discuss 'virtually unable to walk' but do not refer to the 100 yards criterion.<sup>(23)</sup> Training can only be described as minimal with no particular mention of the legal nature of decisions that are required in giving an opinion of whether or not the statutory conditions are satisfied. Since they are not independent statutory authorities the training they do receive cannot be considered comparable to that undertaken by adjudication officers.



The Lay Scrutiny EOs are trained by the Medical Officers of M7 and, therefore, assess claims and recommend decisions according to the tuition and the guidance notes received from Departmental officials. The guidance material attempts to lay great stress on the independent nature of lay scrutiny, but much of the contents leave very little room for the lay official to advise the adjudication officer in any other way than the guidance directs. It also mentions the 100 yards criterion and notes that 'normal' walking should be considered as 3-4 miles per hour, or 100 yards covered in 1-1½ minutes.

Training for all NFCO adjudication officers was undertaken by officers of the PAO section who held general courses (comparable to the Initial Adjudication Course at Nottingham) supplemented by more specific instruction on the relevant benefit. However, although adjudication officers are the ultimate legal decision-makers on both the lay and medical questions, they receive no training on how to adjudicate on the medical questions. Furthermore, the Insurance Officer's Guide provides no assistance to the adjudication officer who has to decide if the medical questions are satisfied; there is not a single reference to the 'virtually unable to walk' test. One of the PAO staff involved in training recognised the paradox of a lay decision on a medical question,

"We are responsible for training adjudication officers but 'virtually unable to walk' is a medical question, we are not really competent to advise on its interpretation. Any problems are referred to M7 here. But there's no doubt that we should be able to advise on all lay decisions." (HEO, PAO section)

Whilst the adjudication officer receives virtually no training on the medical questions, the training of EMPs and Lay Scrutiny EOs is geared not only to the legislative requirements but to the additional decision criteria (especially the 100 yards test) that originated as Departmental policy. Although these decision criteria have no



statutory basis there was no doubt that they had been fully assimilated by EMPs and Lay Scrutiny EOs alike.

### Advice

As was explained earlier, the PAO section at NFCO provides an additional tier of advice (between OCAO and the HEO) within the formal advice arrangements of the adjudication system. However, these arrangements are patchy in their effect. On the lay questions (age and residence and presence), the IOG provides ample advice accumulated over many years, but provides none on the medical questions. However, since the adjudication officer is little more than a rubber stamp on the medical questions, this anomaly has never manifested itself as a problem for adjudication officers themselves or the PAO section.

"PAO are always good when we need to go to them but I can't recall ever asking about 'virtually unable to walk' or any of the other medical questions. If there is anything I'm not quite happy with, I refer the case to the medical branch." (Adjudication Officer)

"If we are asked for advice on the medical aspects of mobility allowance the practice is to go to M7 for help - they're the experts." (Adjudication Officer)

As mentioned earlier, the advisers to the Lay Scrutiny staff are the Medical Officers of M7. The arrangement was satisfactory from both ends.

"The Medical Officers in M7 deal with mobility allowance all the time so we always rely on their advice." (Lay Scrutiny EO)

"What has surprised and impressed us is how Lay Scrutiny have become proficient at knowing which cases need advice." (Senior Medical Officer, M7)

As EMPs, medical practitioners are experiencing the same frustration with the withdrawal of advice by Regional Office Medical Officers as they do as AMPs on industrial disablement benefit assessments. Advice

is still sought and given, however, albeit on an informal basis or in relation to 'general questions' rather than individual cases.

The result of this has been that the main contributors to the consideration of the medical questions, ie the EMP and, since 1984, the Lay Scrutiny EO, have been advised not by external, independent sources but, if at all, by NFCO Medical Officers in M7, ie Departmental officials. As a consequence the Departmental view of the interpretation of the legislation, which is first transmitted via training, is reinforced and perpetuated.

### Monitoring

The monitoring system is intended as both a check on, and an indirect promoter of, accuracy. The formal system comprises checks by the PAO section (on behalf of the CAO) on the decisions of adjudication officers, but is primarily concerned with lay issues. On the medical questions PAO have deferred to the greater expertise of the Medical officers of M7, who until recently, vetted and advised on all EMP reports. However, with the introduction of lay scrutiny, M7 now see only one in ten of these (after Lay Scrutiny have added their opinion) as a routine check on both the standards of the reports and the efficiency of the lay scrutineers. So, once again, because of the low level of involvement of the adjudication officer, monitoring, which is normally considered to be a task for an independent body, is carried out in practice by Departmental officials. Hence, the standards they are judging decisions against are the very standards they instigate and perpetuate. Monitoring of lay decisions follows the normal format as described in chapter 3. Whilst the lay questions are subject to the full force of independent monitoring system the more important medical questions escape any real independent assessment. So not only is there no independent advice on how to interpret the difficult parts of the law (especially virtually unable to walk), but no independent check on the interpretation that is adopted.

Paradoxically, however, it appears that the medical monitoring of Lay Scrutiny by M7 is a far more effective indirect promoter of accuracy (or consistency) than the lay monitoring of adjudication officers by the PAO section. There appear to be several possible reasons for this. Firstly, the formal system within NFCO has attracted a reputation with NFCO staff for 'nit-picking' (just as Regional monitoring teams have with adjudication officers in local offices). Hence their reports are similarly devalued in the eyes of the adjudication officers. On the other hand, there is a far more relaxed and informal relationship between Lay Scrutiny and M7. Trivial errors may be noted but they will not be used as a formal statistical reflection of the lay scrutineers' standards of work. And, where more substantial deficiencies are apparent, there are no obstacles created by an 'independent' status (which may hamper PAO) to M7 correcting them quickly and informally. Hence, while the contribution of the formal monitoring system to accuracy is limited, the internal administrative monitoring of medical decision-making is far more effective.

#### The Tribunal System

The final contributor to accuracy, again in an indirect way, is the appeals hierarchy. For the adjudication officers in the Mobility Allowance Unit the effect of SSAT hearings mirrored that found in the local offices. Tribunal cases, whether heard by an MAT or an SSAT, were seen as unique entities in that each case would have a particular set of circumstances on which a decision must be based; any dispute would primarily be about the evidence; how the tribunal viewed and weighed that evidence was of little general relevance to future decision-making. Only if some general principle of law was discussed might there be some relevance for cases in the future. However, when an adjudication officer was considering a borderline case where the evidence available did not point to one particular decision, the prospect of a possible appeal had an effect even though it would not

be the adjudication officer himself or herself who would be required to present a case before a tribunal.

"I think to myself: if I disallow it, how is it going to look at a tribunal, am I going to be able to write a convincing submission?" (Adjudication Officer)

"We like to think we make good decisions here<sup>(24)</sup> so we try to be thorough before making a decision. I wouldn't want to give a presenting officer a doubtful case to present at an appeal." (Adjudication Officer)

The effect of this questioning was not so much that awards were made where the adjudication officer was leaning towards disallowance but that an attempt was made to gather more evidence or clarify existing evidence, or that an approach was made to the HEO or the PAO section for advice (or a referral to OCAO considered) if this had not already been done. So, the mere existence of the appeals hierarchy was enough to ensure that difficult cases were studied and considered more fully than the more straightforward ones. From the closer scrutiny that such cases receive, the inference may be made that eventual decisions are likely to be better, or at least more firmly grounded.

The discussion of accuracy and mobility allowance decision-making has revealed that the concept is hard to tie down when the existing scope of the legislation and its associated case-law still leaves a large 'policy space' from which decisions must emerge. The prime example here is the medical condition 'virtually unable to walk', where non-legal decision criteria have rushed in to fill the space. The elements of the decision-making system that might be thought of as promoting accuracy, therefore, at the present only promote a consistent approach, rather than necessarily an accurate one.

However, accuracy is only one of the demands of administrative justice; the next section will explore how promptness, impartiality, participation and accountability are treated in the mobility allowance decision-making system.

## 2 - Fairness

### (a) Promptness

It was noted in chapter 3 that the only statutory reference to how much time should be taken in dealing with a social security claim is that the adjudication officer should dispose of the case within 15 days of receiving the casepapers. However, it was argued that this requirement was rendered virtually impotent since it made no mention of the time that the case was elsewhere other than with the adjudication officer. Probably nowhere else within the social security system is this better illustrated than by the mobility allowance scheme, since the adjudication officer only receives the case after it has spent weeks with the Regional Office, the EMP and with Lay Scrutiny (and possibly M7). Of far more relevance is the clearance time between the Department receiving the claim and the notification to the claimant of the final decision.

In 1983, the DHSS published a report which, inter alia, examined the administration of mobility allowance, and particularly the time taken to process claims (Oglesby, 1983). In the first quarter of 1982 it was found that the average clearance time for mobility allowance was nineteen weeks. A year later it was down to sixteen, upon which Oglesby commented:

"...there has been some improvement. My impression is that the improvement is continuing, but the times are still too long." (p.1)

Oglesby recommended (1983, p.59) that a target clearance time of 6-7 weeks could be achieved by a series of administrative changes designed to reduce the periods that casepapers spent in transit between various parts of the organisation, and by streamlining the procedures for obtaining and checking the MY22 medical report. Such an approach accords well with the treatment of promptness in chapter 2 where it

was argued that the term is not readily amenable to conversion into absolute criteria but should instead address the minimisation if not the elimination of the time that a case is lying idle, ie having no action taken upon it. Mobility allowance decision-making is particularly suitable for such a treatment since it mainly relies on evidence gathered from sources within the influence or control of the DHSS. (This contrasts with industrial disablement benefit where large sections of the evidence may be supplied by outsiders such as employers, workmates, hospitals, GPs, etc.) In the large majority of cases, the claim form completed by the claimant and the medical report from the EMP are sufficient to allow a decision to be made. In this context an average clearance time of 16 weeks, the 1983 figure, appears to be extraordinarily long. But since the stages in the process were under the control of the DHSS then, Oglesby concluded, internal administrative changes would be sufficient to improve matters. He recommended, inter alia, that

- the claimant's own GP should in most cases supply the MY22
- medical advice on every claim should be replaced by wholly lay awarding, with medical advice being available on request
- Regional Offices should take over the administration of mobility allowance
- better staff complementing to match workload should accompany any other changes

Some of the recommendations have been implemented; in particular Lay Scrutiny is now permanently established, and staff numbers are increased to reflect workload on a quarterly basis rather than annually as before. Other recommendations such as the switch to Regional Office processing and the greater use of GPs have been the subject of internal studies but have been rejected. But, apart from the specific changes, it is clear from staff at the Mobility Allowance Unit that the Oglesby report provided a much needed stimulus to improve the administration of mobility allowance which was otherwise lacking.



The overall result has confirmed Oglesby's impression that the improvement he noted between 1982 and 1983 would continue; in the summer of 1986 average clearance times had been reduced to eight weeks, still short of Oglesby's target but a striking improvement from 1982.

What Oglesby provided, and what is usually lacking on a routine basis, was an independent analysis and assessment of clearance times. Without such scrutiny there is the danger that clearance times will creep upwards, since one way in which the DHSS can conserve administrative resources is to limit the number of staff in the Mobility Allowance Unit. However, the gap temporarily filled by Oglesby remains unfilled on a permanent basis; the monitoring that is carried out is concerned with standards of adjudication only, and not with the time taken to process cases fully, a claim taking a year to process would not attract a 'comment' on that ground alone. It is an unfortunate omission.

The conclusion to be drawn is that promptness remains an elusive notion; eight weeks clearance time now sounds impressive but would not be if claimants had to rely on mobility allowance as the basis of their weekly income. More constant, public scrutiny of clearance times would help to ensure that 'promptness' is interpreted reasonably by the DHSS and not sacrificed to the expediency of saving staff costs.

#### **(b) Impartiality**

In chapter 3, it was argued that prejudice or bias in decision-making originated from two main sources, the decision-maker and the DHSS. However, it will be clear from the discussion of mobility allowance so far that the adjudication officer (to whom the advice in the IOG to refrain from contact with the claimant is directed), is only really considering evidence and applying law for the lay questions; for the



medical questions he or she is little more than a rubber stamp. On the medical questions it would be more appropriate to apply the demand of impartiality to the EMP and the Lay Scrutiny EO, and perhaps also the Medical Officer in M7 when advising on individual cases. Since M7 is also the ultimate source of advice for both (directly for Lay Scrutiny, and indirectly through its influence on training for EMPs), the impartiality of its Medical Officers should also be examined.

Bias can only really flourish where the law allows choices to be made. The adjudication officer deciding the lay questions has essentially no room for manoeuvre on the age question and only a limited scope on the residence and presence conditions where case-law has developed sufficiently to limit the 'policy space' within the statutory framework. However, in cases where residence and presence are not easily decided (and such cases most frequently apply to immigrants or individuals with families living abroad), the adjudication officer will often have to weigh conflicting evidence or assess incomplete evidence, ie a decision will be made according to how the adjudication officer assesses the weight of each piece of evidence in relation to the rest. This defines the marginal territory where the personal predilections of the adjudication officer, whether in relation to the law itself, a general class of claimants (for example, immigrants), or an individual claimant can be decisive.

"I suppose I could let my prejudices interfere with my adjudication, if, for example, I just disallowed an immigrant's claim on residence and presence without making sure that he had got all his facts straight, which is what I do in practice. If I was colour prejudiced it could come through in that way. But it doesn't happen like that."  
(Adjudication Officer)

"If there's any bias, it's towards claimants who can't walk. We like to think that we give them every chance to make a successful claim. I think that's the general attitude here."  
(Adjudication Officer)

The possibility of bias towards an individual claimant arising from contact with the adjudication officer is virtually eliminated because of the geographic isolation of the Mobility Allowance Unit; personal contact between the two parties is rare. Nevertheless, although bias and prejudice can find little space in which to intrude on the lay questions, what scope does exist can go relatively unchecked, in that the monitoring system is unlikely to detect it. On the medical questions, Lay Scrutiny is in a similar position to the adjudication officer on the lay questions, the Lay Scrutiny EOs have the evidence before them and fairly detailed criteria (compared with the legislation) on which to form an assessment. Furthermore, they will never see the claimant.

The position of EMPs is very different. They are probably the most important actors in the whole decision-making process since they provide the evidence on which the outcome of a claim will depend, and also give opinions on whether this satisfies the legislative criteria. Furthermore, their part in the process is carried out mostly in direct contact with the claimant. The EMP, therefore, is in the position of knowing what evidence will satisfy the criteria and also supplying that evidence. So, if an EMP did harbour any prejudices (of the kind listed earlier in relation to the adjudication officer) there is scope for them to find expression during the recording of the medical examination or the walking test, and afterwards when giving an opinion. For the single EMP completing the medical report, professional integrity and the lack of any previous contact with the claimant are relied upon as a guard against the intrusion of bias.<sup>(25)</sup> An assessment of whether such a reliance is effective or not is difficult. However, the impression gained from the interviews conducted was that, in general, the medical examination and the walking test are carried out in an impartial, clinical fashion, much as the doctor would perform at his surgery or in a hospital when investigating a medical problem. This is encouraged by the medical report form which sets specific questions for the EMP to answer; the

only way to entertain any prejudice, either to assist the claimant in getting the benefit or to hinder him in some way, would be for the EMP to weight his answers in a certain way (or make a deliberately false statement), which is very difficult when mostly factual answers are required (although some of the qualitative answers requiring more of a descriptive than quantified content could possibly be slanted).

In conclusion it seems that the relative simplicity and clarity of the evidence requirements of mobility allowance decision-making and the use of medical practitioners to collect it, allow very little scope for bias on the part of the Lay Scrutiny EOs or the EMPs to affect consideration of the medical questions. However, as was argued in relation to the lay questions, what scope there is may go undetected under the present decision-making arrangements. How this might be changed will be considered in the discussion which forms the final part of this chapter.

Any influence by the DHSS on decision-making, as explained in chapter 3, is on the whole not considered conducive to fairness; hence the advent of the independent adjudication system. However, the decision-making arrangements for mobility allowance clearly allow great scope for Departmental officials to influence the substance of decisions (on both a mass and an individual level) through the involvement of M7 in training, advising, and monitoring on the medical questions. And as has been shown it has been the Department that has led the way in refining the interpretation of 'virtually unable to walk', particularly with the introduction of the 100 yards criterion. Such a weakness in an independent adjudication structure is not necessarily a criticism of the DHSS but of a structure of medical adjudication in general which lacks independent advice and monitoring systems to assist those having to grapple with sometimes difficult interpretations of statute and case-law particularly when they are not an independent statutory authority. (26)

### **(c) Participation**

Participation, as a demand of administrative justice, is difficult to assess; like promptness one must appeal to some general notion of reasonableness in order to decide whether the demand is satisfied. In relation to social security decision-making, chapter 3 argued that since the final decision depends greatly on the evidence on which it is based, then there is ample scope within the information collection stage of the decision-making process for the claimant to participate. This would improve the chances that all information relevant to a claim is collected, and therefore considered by the adjudication officer.

However, in relation to mobility allowance, little opportunity appears to be afforded the claimant in practice. On the lay questions the claimant is required to respond to specific questions on the initial claim form; on the age this is no problem, but in relation to the residence and presence conditions the claimant has to answer 'Yes' or 'No' to three or four questions which include phrases such as 'normally live' and 'have you lived...' which will have a common-sense meaning to the claimant but are also imbued with legal significance. The following case-note illustrates the problem.

#### **Case #2 - A problem of lack of understanding of the residence and presence conditions**

A renewal claim from an Asian man already in receipt of mobility allowance revealed that there was a discrepancy on his initial claim regarding his whereabouts over the previous year or so. The second claim indicated that although he had answered Yes to the question 'have you lived in Britain over the past 18 months', he had in fact been in Pakistan for some of that time. A long exchange of correspondence revealed that the man arrived in Britain in 1968 but made occasional but lengthy visits to his

family in Pakistan. He had answered Yes to the initial question because he considered himself a permanent resident in this country (a not unnatural supposition). The confusion had resulted in an overpayment which the unfortunate claimant was required to repay.

The adjudication officer on this case commented,

"This misunderstanding wouldn't have happened if we'd been able to see the man when he first put in a claim. Trying to get a clear idea of people's movements over 18 months is sometimes difficult so we just accept the statement on the claim form. And on this case there's been a tremendous number of letters sent trying to find out the true picture. One interview with me could have done the job."  
(Adjudication Officer)

In connection with the medical questions, claimants can make a statement in part 2 of the medical report regarding their own assessment of their health and walking ability. However, in practice the EMP completes the statement and reads it back to the claimant, who is asked to sign it as a true statement. The EMP is guided in what to ask by the preamble to part 2 of the medical report, which reads as follows:

"Please ask the claimant to tell you about their [sic] medical history and details of walking ability including distance, time taken and the degree of stress or pain caused. Ask them to give details of recent hospital attendances, the consultant's name and the name and address of the hospital. Write down as nearly as possible the claimant's own words. Please read over to the claimant what you have written. Ask them to agree or amend the statement and sign and date it."

For the EMP, this stage is considered to be as routine as taking a medical history from a patient, but for the claimant it is the only opportunity of presenting his or her version of events. However, EMPs admitted that it is not presented in this way, but merely as part of the list of questions that a claimant will have to answer. It is

doubtful whether the claimant realises how important the statement might be.

"We don't really explain anything to the claimant except that we've got to complete this form, which will involve a few questions and a short walk." (EMP, Region #2))

Also it can be very difficult for claimants, without prior thought, and in what may be a stressful situation, to give any accurate assessment of their own walking ability in terms of distance, speed etc., which may in any case be subject to wide variation depending on the physical condition of the claimant at different times (as mentioned earlier, claimants can have 'good' and 'bad' days).

After part 2 has been completed, claimants have very little to contribute other than to subject themselves to a medical examination and the walking test; they are not told of the EMP's findings nor given an opportunity to comment upon them.

Although it was suggested that participation is difficult to assess it is possible to identify how it might be improved (at least in relation to the medical questions). This is important, not only because participation is an inherent demand of administrative justice and should be enhanced whenever practicable, but because it may lead to an improvement in the quality of the evidence in the sense of providing a fuller picture of the claimant's walking ability than the results of a single, brief test. This may lead to the decision-making process becoming more difficult if confusing or contradictory evidence results, but at present the EMP's observations alone are taken to represent the 'true facts' of the case, which (without at all impugning the integrity of the EMP) may not necessarily be so. (27)

If claimants were given the opportunity to participate more by greater involvement in the completion of part 2 of the medical report, or by being allowed to comment on the findings of the walking test, there might be more confidence that the 'true facts' would emerge and hence



a more accurate decision result. This might be achieved by taking a claimant's statement after the test as well as before. <sup>(28)</sup> This would also provide a safeguard against any possible (though unlikely) bias or prejudice on the part of the EMP.

Participation, therefore, receives little attention in mobility allowance decision-making, either as a desirable feature of intrinsic merit (which administrative justice would demand), or as an aid to the promotion of accuracy, or as a guard against bias.

#### (d) Accountability

The essence of accountability is the giving of reasons, not only for final decisions, but also for sub-decisions and for the conduct of enquiry (ie why certain information is collected and what use will be made of it).

Mobility allowance is a relatively simple benefit; even when broken down into the separate questions to be answered the resultant list is not lengthy and many elements are reasonably straightforward. As a result the information leaflet that a prospective claimant will receive is able to include a brief and clear explanation of the conditions that the claimant will have to satisfy. It also notes the factors that the adjudication officer will consider in making a decision about ability to walk (distance, speed, time, gait, etc.). But having received this initial information, claimants are unlikely to learn anything more about how their claims are decided. For the claimant who is successful this will not perhaps be of any great interest or importance, but for the disallowed claimant, knowing why the claim was rejected, ie explaining the link between the evidence, the decision criteria and the decision, is essential, since it is difficult to mount an effective appeal against a decision, or even know what to base an appeal on, if no explanation is given.



In practice the unsuccessful claimant will receive one of two pro-forma letters, one relating to the lay questions, and the other to the medical questions. Both letters quote the relevant legislation under which the claim is disallowed. This may be sufficient to leave the claimant with a clear idea of why the decision was reached (for example, on the age conditions) but particularly on the medical questions the claimant will have little idea of why the adjudication officer considered that a particular requirement was not met.

As Tables 6.3 and 6.4 have shown, most disallowances are on the walking criteria, ie the claimant is judged not to be virtually unable to walk. But apart from stating this fact the decision letter does not enlighten the claimant further. And it is likely that the adjudication officer who made the formal decision would be hard pressed to supply an explanation since he is presented only with the opinions (not reasoned opinions) of the EMP and the Lay Scrutiny EO.

"I'm convinced that most claimants have no idea why they haven't got the benefit. If I was told that I wasn't 'virtually unable to walk' I'd want to know why, but they don't ask." (Adjudication Officer)

"On age, and residence and presence, there must be a lot of appeals just based on ignorance, because there's no real explanation in our decision letters. I think this is why we lose so few appeals." (Adjudication Officer)

Of course, in practice what the EMP and lay scrutineer are doing is applying their knowledge of the legislation and the advice they have received on its interpretation, and in particular using the 100 yards criteria as a necessary aid in forming their opinion. For the decision to be accountable to the claimant he or she would need to be told of the findings of the walking test and how these and other relevant clinical information combine with the legislation (and other decision criteria) to produce the particular decision. This principle could also be extended to the medical examination and walking test, ie claimants should be told that they are being asked to walk 100 yards

because the Department consider this a suitable distance for assessing walking ability. However, some EMPs interviewed considered that this was not advisable since knowledge of the 100 yards test might lead to abuse or fraud; ie if claimants knew that if they were to walk 100 yards then their chances of qualifying would be small, then they would be tempted in their own self-interest to come to a halt at 75 or even better at 50 yards. Hence the 'true facts' of the claimant's condition would not emerge.

Accountability in relation to the initial decision on a claim is not encouraged by the formal requirements of the Adjudication Regulations. Regulation 33 requires that adjudicating medical authorities record their findings of fact in relation to a case and, where there is dissent from one member, the reasons for that dissent. However, this only has relevance for the Medical Board (since the EMP is not an adjudicating medical authority) which rarely sits on initial decisions and, when the Board is unanimous, which it almost invariably is, no reasons need be recorded. This contrasts with the duty placed upon Medical Appeal Tribunals (by regulation 34) to record, and communicate to the claimant,

"... a statement of the reasons for their decision, including their findings on all questions of fact material to that decision."

The importance of this practice has been emphasised by a Tribunal of Commissioners in R(M) 1/83:

"Although in many cases a medical appeal tribunal can state their findings very briefly, they must deal with any specific contention addressed to them which they reject. In particular reasons must be given where the tribunal reached a conclusion different from that reached by the medical board. An unsuccessful claimant should be able to see on which of the various possible grounds his claim has failed."

In conclusion it appears that accountability in the sense adopted here is not well-served by the present decision-making arrangements at the

front line in respect of the condition (walking) that accounts for the vast majority of mobility allowance disallowances. It is difficult to see why the duty imposed upon Medical Appeal Tribunals to give reasons for decisions is not equally applicable to at least the Medical Board as the first level of appeal and the adjudication officer as the initial decision-maker. More explanation is not only desirable per se, however, it can act as Robson argues (see chapter 2, p.60) as a contributor to greater accuracy. And if the requirement for greater explanation was extended to awards as well as disallowances, the monitoring system would be in a better position to identify unsound decision-making.

## **Part IV - DISCUSSION AND CONCLUSION**

An analysis of mobility allowance decision-making presents some useful contrasts to decision-making on industrial disablement benefit (and special hardship allowance). Firstly, the organisational arrangements of the lay officials of the DHSS are separate, although the two systems do meet in the Medical Boarding Centre in the shape of the medical practitioners who act as both AMPs for industrial disablement benefit and EMPs for mobility allowance. Secondly, as this chapter has shown, decisions on mobility allowance depend more often on the interpretation of the decision criteria than on the accumulation of evidence. These contrasts will be discussed more fully in the final chapter; the aim of this concluding section is to review the conclusions reached about the administration of mobility allowance and the insights that they offer regarding the theory and practice of the independent adjudication system of social security administration.

### **1 - Mobility allowance and the adjudication system**

The promise of the adjudication system, comprising as it does the three tiers of independent statutory authorities, and the external advice and monitoring agency of the CAO, is of high standards of decision-making based solely on statute and case-law and free from the influence of Departmental interests. However, to fulfil this promise, there are certain conditions that must be met. Firstly, decision-making should be limited to the independent statutory authorities; secondly, advice and monitoring should be restricted to the OCAO; and thirdly, extraneous decision criteria should either be legitimated as valid, or else excluded from the practice of decision-making. However, as this analysis has revealed, these conditions are breached several times in mobility allowance decision-making.

Nevertheless, it should not be assumed that the independent adjudication system necessarily provides a guarantee that administrative justice is achieved in practice. This scrutiny of mobility allowance administration also reveals that whilst some practices offend against the logic of independent adjudication they can make a contribution to administrative justice.

**(a) Will the real decision-makers please stand up**

It is clear that decision-making on mobility allowance is not a unitary exercise but comprises the collection of information and application of decision criteria on a number of separate 'sub-decisions'. For some sub-decisions the person supplying the evidence is more important in the determination of the final decision than the individual who formally applies the decision criteria to it. In effect, the decision is made elsewhere than with the formal decision-maker, ie it is made by the effective decision-maker. As argued earlier, anyone applying decision criteria to evidence is decision-making whether or not he has that formal role. If his decision is then merely endorsed by another official not competent to make the initial decision (ie without the requisite knowledge and experience to assess the evidence) then he can also be considered the effective decision-maker. Within the administration of mobility allowance there are several decision-makers; the adjudication officer is the formal decision-maker on all questions but the effective decision-maker on only the lay questions; the EMP, the Lay Scrutiny EO, and occasionally a Medical Officer in M7, are jointly the effective decision-makers on the medical questions.

Identifying the real decision-makers within the system is important because the full force of the advice and monitoring arrangements at the level of the initial decision fall only upon the formal decision-maker, the adjudication officer. The activities of Lay Scrutiny and the legion of EMPs lie outwith their sphere of influence.

(b) The status of 'opinions' within an adjudication system.

One of the distinctive features of mobility allowance decision-making is the giving of 'opinions' by EMPs about whether or not the statutory provisions are satisfied. The question arises, therefore, of whether an EMP opinion is to be considered part of the evidence on which to base a claim or as a form of advice or guidance to the lay decision-maker in the Mobility Allowance Unit. Clearly an opinion cannot be compared to a piece of factual information, such as the distance walked by a claimant, or a diagnosis of his or her physical condition. On the other hand, if it acts as advice or guidance the criticism can be made that decision-makers should only be advised by independent sources and not medical practitioners who are trained and supervised by Departmental officials.

A possible response to this anomaly would be simply to omit the part of the medical report which asks for an opinion, and allow the adjudication officer to decide the case on the evidence of the clinical findings and the walking test.<sup>(29)</sup> What would be lost by such a measure, however, would be the built-in checking mechanism that the present arrangements provide, ie if the EMP and the lay scrutineer, both of whom have been trained to be quasi-adjudicators, agree on an assessment then some confidence can be expressed that, in relation to the evidence, an accurate decision has been reached. At the moment, whenever there is any disagreement between the EMP and the EO that is potentially to the claimant's disadvantage, the present arrangements allow referral to a Medical Board.

The practice of giving opinions is an example of the logic of independent adjudication being undermined whilst administrative justice is served nonetheless. The assessment of EMP opinions by Lay Scrutiny EOs (who are not themselves independent statutory authorities) is also contrary to the tenets of independent adjudication. However, the redefinition of those officials as

independent adjudication officers (a move under consideration within the Mobility Allowance Unit) would remove this anomaly by bringing their activities within the legitimate scrutiny of the Chief Adjudication Officer.

**(c) Advice and monitoring loopholes**

The anomalous position of lay officials making decisions on medical questions adds emphasis to the conclusion reached at the end of the preceding chapter that the medical adjudication system would greatly benefit from the introduction of a medical equivalent of the CAO. By such a move the advice and monitoring function currently undertaken by the Departmental Medical Officers of M7 could be assumed by an external, independent agency. This agency would be free from the type of influence from the DHSS which resulted in the adoption of the 100 yards criterion as an indicator of walking ability

**(d) The Medical Board in no-man's-land**

The creation of OPSSAT in 1983 to oversee the administration of SSATs and MATs left the Medical Boards in an administrative no-man's-land. It is true that, before then, the Boards were in a similar anomalous position being, at the same time, independent statutory authorities and under the administrative direction of the DHSS. But this was also true for tribunals. Part of the rationale behind the creation of OPSSAT was to remove this anomaly. However, in the reorganisation of tribunals, the logic of independent adjudication did not extend to the Medical Board even though it is the first level of appeal for claimants who are disallowed on the medical questions.

The Medical Board, post-OPSSAT, is therefore something of an administrative chimera. It is an appeal body whose decisions carry the same force as those of adjudication officers and MATs, but whose members also serve in an advisory capacity on initial claims as EMPs.



As EMPs, doctors can seek the advice of Departmental Medical Officers, as members of a Board they are independent statutory authorities and cannot, although the guidance they receive in the former capacity is likely to have as much force as when they consider cases as a Board.<sup>(30)</sup> The problem of the Medical Boards could be resolved either by their assimilation within the OPSSAT structure, or by their abolition.

## 2 - Conclusion

Some features of decision-making in practice, such as the existence of the medical boards and the advice role of Departmental Medical Officers, appear to have worked adequately since 1976, from which the argument could be made that, if it works, then it should be left alone. Against this position two general principles might be cited. The first is that, in a legal rules-based system of decision-making (such as mobility allowance), the task of filling policy spaces left (perhaps deliberately) by the legislation should not be entrusted to the implementing agency unless the law specifically directs that that should be the case, but should be the responsibility of individuals and bodies independent of the executive. Such a principle underpins the evolution of OCAO from the previous offices of the Chief Insurance Officer and the Chief Supplementary Benefits Officer, although the principle of an independent advice structure has not been extended, as yet, to medical adjudication nor to the second or subsequent levels of the decision-making hierarchy. The second principle is expressed in the familiar maxim 'justice should be seen to be done'. This, inter alia, would demand changes in the composition, status and operation of the Medical Boards as the first level of appeal, and the public acknowledgment of the criteria by which walking ability will be assessed.

The decision-making system of mobility allowance is, like that of industrial disablement benefit, beset with anomalies. However, as

this chapter has shown, not all of these are inimical to administrative justice (such as the current practice of advice-giving), whilst others (such as the position of the Lay Scrutiny section) are under active review by the Mobility Allowance Unit.

A last conclusion of this chapter is to reinforce the claim made at the end of chapter 5, that the framework presented in the theoretical treatment of administrative justice presented in chapter 2 provides an effective analytical tool for a critical evaluation of the administration of a welfare service.

## CHAPTER 7 - ADMINISTRATIVE JUSTICE: CHIMERA OR SUBSTANCE?

### Part I - INTRODUCTION

In Bureaucratic Justice Mashaw (1983) sets himself the task of showing that the search for an internal administrative law which holds the promise of providing justice is not, as is frequently supposed, a 'doomed enterprise' (1983, p.1) but a feasible possibility, albeit a difficult and challenging one. An essential part of Mashaw's 'crusade', as he calls it, was to reorient discussion away from a preoccupation with external administrative law (which is concerned with the mechanisms through which individuals can obtain redress against the decisions of state officials) and into the administrative agency itself, since, as he explains,

"... it is here that 100 percent of bureaucratic implementation begins, and most of it ends." (1983, p.4)

The preoccupation of administrative lawyers and social scientists with external administrative law has also been mirrored in the UK (see chapter 1) and has led to such pessimistic conclusions as those provided by Frost and Howard (1977) in their study of representation at social security tribunals,

"... social justice for the inarticulate and vulnerable citizen in his dealings with bureaucracy may constitute no more than a chimera ... a fair hearing is perhaps the most that can be expected and the least that should be offered." (1977, p.73)

In his attempt to direct attention away from such narrow perspectives, Mashaw argues in effect that a fair hearing is certainly not the most that can be expected and more emphatically not the least that should be offered. Mashaw was not the first to recognise the importance of the 'front line'; for example, a study of the administration of unemployment insurance benefits in Canada argued that judicial review

should not be the decisive factor in administrative justice and that concern should be focused on,

"... the achievement of justice at a stage well in advance of the intervention of the courts, in other words, during the administrative decision-making process." (Issalys & Watkins, 1977, pp.339-40)

Nevertheless, Mashaw's contribution has been much greater in his attempt to provide a 'necessary beginning' (1983, p.16) towards a normative theory of administrative justice which has both descriptive and evaluative power.

This thesis has attempted, in turn, to build upon this beginning by examining the detail of Mashaw's theorising, identifying its many strengths and occasional weaknesses, and suggesting an admittedly derivative but nonetheless different approach to administrative justice. Like Mashaw, the techniques I have adopted in this study have been in part empirical and in part intuitive and analytic. Whether the analysis presented here is convincing or not must rest on whether it satisfies the demands upon normative theory articulated by Kamenka (see chapter 1, pp.14-15), ie that it contains internal coherence and logical consistency, that its empirical claims are valid and that its consequences and implications concur with our own beliefs.

The aim of this chapter is to review the coherence and consistency of the theoretical treatment of administrative justice presented in chapter 2 and to summarise the results of its practical application in the empirical study of industrial disablement benefit and mobility allowance. Part II concentrates on the analysis of social security decision-making at the front line. The examination of industrial disablement benefit and mobility allowance provides the opportunity of comparing and contrasting lay and medical decision-making, and the effects of two types of organisational arrangements, one based on a network of over five hundred local offices (for industrial disablement

benefit), and the other on a single, central agency (for mobility allowance). A review of the conclusions drawn in chapters 5 and 6 will be followed by some suggestions of ways in which the concept of administrative justice can contribute firstly, to improvements in the overall decision-making system (ie how institutional changes could promote the achievement of accuracy and fairness across all social security benefits), and secondly, in the administration of industrial disablement benefit and mobility allowance in particular.

Part III examines the theoretical treatment of administrative justice and decision-making offered in the thesis, by questioning its validity and robustness as theory, by identifying potential problems and possible weaknesses, and by suggesting ways in which administrative justice could be developed in the future. The thesis concludes a brief consideration of the wider applicability of administrative justice to public administration and beyond (ie in the relations between individuals and private organisations), and the prospects for administrative justice as the source of a normative framework for assessing developments in social security policy and administration in the future.

## Part II - THE VERDICT ON PRACTICE

### 1 - The Social Security Adjudication System

As formulated in this thesis, administrative justice provides a normative set of criteria by which an administrative agency's activities can be evaluated, but is not prescriptive in the sense that it requires a certain type of decision-making system (ie particular decision-making processes and organisational environments). The adjudication arrangements of the social security system cannot, therefore, be criticised per se but only by reference to their propensity either to promote or to undermine the attainment of accuracy and fairness.

An early observation to emerge from scrutiny of the formal adjudication system (see chapter 3) is that it covers only part of the total decision-making process, ie that part which requires the application of statutory legal rules to the evidence presented to adjudication officers. So, no matter how rigorous the process of adjudication monitoring by teams from the Office of the Chief Adjudication Officer (OCAO) or on their behalf by regional monitoring teams, there remains a large part of decision-making that is outside this form of external scrutiny. Important within this category are the activities and decisions of the Secretary of State's representative (who could be, inter alia, the clerical staff who routinely assist in information collection, adjudication officers themselves or members of the office management) and decision-making by medical practitioners in their roles as adjudicators or as advisers. I will return to the question of medical adjudicators later but for the moment wish to concentrate on the adjudication officer/Secretary of State dichotomy.

(a) The Doublelife of the Adjudication Officer/Supervisor

The rationale for a decision-making system independent of the line management function of the DHSS derives from the desire to avoid the possibility of Ministers being held directly responsible, through the actions of their officials, for individual decisions on social security claims. The price that has to be paid for that convenience is a loss of control over decisions in individual cases. Where a choice of decision is presented to the adjudication officer, the Secretary of State cannot intervene and impose his interpretation of the decision criteria, although as the comment from one local office manager clearly indicates (see chapter 5, p.211) this can occur in practice. The Secretary of State must also relinquish control over the development of the decision criteria to the Social Security Commissioners and the higher courts. In some circumstances, however, the Secretary of State has been prepared either to risk taking direct responsibility for decisions by designating questions for himself and not the independent statutory authorities, or by devising a hybrid system of decision-making and review for certain questions. The clearest example of the latter comes not from this empirical study but from the Social Security Act 1986 which, inter alia, replaces the Single Payment provisions of previous Supplementary Benefit legislation by the cash-limited Social Fund. The significance of this change is that previously single payment claims were decided by adjudication officers in DHSS local offices, whereas from April 1988 they will be decided by 'social fund officers' who will be Secretary of State representatives and not independent statutory authorities. The protection afforded the individual by the Social Security Appeal Tribunal system and the scrutiny of the OCAO has, at a stroke, been removed; no longer will claimants have rights to single payments if they satisfy certain statutory criteria, instead they will have their claims considered using decision criteria formulated and controlled the Secretary of State. If we are looking, therefore, for a reason why some decisions are allocated to the Secretary of State and others



to the independent statutory authorities, we need look no further than this: political expediency. The replacement of single payments by the Social Fund clearly illustrates the vulnerability of welfare rights when they attract a Government's displeasure for some reason. When the substantive outcomes of any legislative provisions have not met the Government's approval in the past, a common response has been to alter those provisions, ie change the rights afforded to individuals. However, the introduction of the Social Fund demonstrates an alternative tactic, ie the replacement of claimants' legal rights by the more easily-controlled Secretary of State policy.

Another feature of the adjudication system warranting close scrutiny is the independent status of the statutory authorities, the adjudication officer, Social Security Appeal Tribunal, and Social Security Commissioners. The rationale behind this is partly the desire, noted above, to protect the Secretary of State from becoming embroiled in the minutiae of individual decisions, and partly to demonstrate that the maxim 'justice being seen to be done' is put into practice by removing any potential source of Departmental influence in making decisions (thereby promoting impartiality). Whilst the Social Security Commissioners have always been demonstrably independent from the Department, the position of SSATs has not been so clear until the creation of OPSSAT removed all Departmental involvement in the tribunal system. However, a question that has been repeatedly raised in this analysis, and which is applicable here, is why decision-making at the front line does not appear to warrant the same concern as the higher tiers of adjudication when the vast majority of cases are disposed of at this level and decisions are just as much 'legal' as those made by SSATs and the Social Security Commissioners. If independence is valued so much at these levels, we must question whether the independence of the adjudication officer receives sufficient safeguard, in the extent to which he is protected from the influence and the concerns of the DHSS. The responses of the adjudication officers and others in chapters 5 and 6 clearly indicate

that the amalgamation of adjudication officer and supervisor roles has been generally detrimental to the pursuit of independent adjudication. In the interests of greater independence, therefore, there is a case for returning to earlier arrangements where adjudication was carried out full-time by appropriately trained officers who were not subject to the merry-go-round of staff rotation.

An independent adjudication system can be thought of as having an internal logical force which is undermined by combining adjudication officer and supervisor duties. Another example is the position of medical boards and the Lay Scrutiny section within mobility allowance decision-making. The medical boards operate as the first level of review; if a claimant writes to the Mobility Allowance Unit to appeal against a decision, then the case will be considered not by a Medical Appeal Tribunal operating under the auspices of OPSSAT but by two doctors acting as decision-makers in their own right (ie not as advisory EMPs) although the claimant is given none of the opportunities (for example, of seeing the papers submitted by the DHSS or of being represented) that are afforded to tribunal appellants. The position of the medical boards is clearly an anomaly, in response to which they could either be abolished, <sup>or</sup> assimilated within the jurisdiction of OPSSAT. The problem of lay scrutiny is different in that officials in the lay scrutiny section act supposedly as advisers, not decision-makers. The independent adjudication system designates the adjudication officer as the decision-maker on the lay (and some medical) content of social security legislation (unless allocated to the Secretary of State of course), but in mobility allowance decision-making the main effective decision-makers are the lay scrutineers; they, not adjudication officers, are trained to examine EMP reports and it is their recommendations to adjudication officers that are scrutinised by the Mobility Allowance Unit medical officers in M7. The formal decisions of adjudication officers are in contrast mere rubber stamps for decisions taken outwith the adjudication system. The remedy here, though, and one which is being favourably considered

by the DHSS, is to designate lay scrutineers as full adjudication officers and possibly extend their duties to cover decision-making on the lay questions (such as residence and presence).

**(b) Medical Adjudication**

A further area of anomaly and confusion is the whole question of medical adjudication. Although the distinctions between lay and medical questions are clearly made in the legislation of social security, the practice is much less clear. As explained in chapter 3, medical practitioners fulfil a number of roles in social security decision-making, as decision-makers, as advisers, and as providers of information. The legislative distinction is important since whether a question is designated lay or medical will determine whether an appeal will lie to a Social Security Appeal Tribunal or a Medical Appeal Tribunal. However, it does not necessarily follow that a medical question will in the first instance be decided by a medical practitioner. In mobility allowance administration the EMP furnishes a report which comprises part medical diagnosis and part opinion on whether the legislative criteria are satisfied; he does not make a decision on the claim, this is the responsibility of the lay adjudication officer who, as was noted above, in turn relies on the recommendation of a lay scrutineer. As a decision made by a lay official, therefore, the outcome of the decision-making process (and the process itself) should fall to the lay monitoring bodies (in this case the Mobility Allowance Unit PAO section) to scrutinise, and to issue advice on. In practice, the medical questions are deemed outwith the competence of the PAO section who in consequence do not advise on, for example, 'virtually unable to walk' and 'duration' questions. As a result, (as was seen in chapter 6) the 'policy space' has been filled by decision criteria (principally the 100-yard rule) that have remained hidden to OCAO, MATs and the Social Security Commissioners.

This example highlights the lack of and the need for some kind of 'Medical CAO' (discussed in the conclusion to chapter 5, see p.237) to perform an advice and monitoring function on the medical questions whether they are decided by lay or by medical personnel.

A doctor working for the DHSS (in whatever capacity) is usually required to perform a mixture of tasks, some of which will be commonplace medical practice (such as taking histories, making diagnoses of a claimant's condition, and giving a prognosis of its likely course) whilst others will be distinctly medico-legal in character; for example, where the legal decision criteria contained in the legislation are also medical in nature (as in the percentage assessment of disablement in industrial disablement benefit decision-making, or the 12-month rule in mobility allowance decision-making). The perceptions of these decisions by EMPs and AMPs is, however, markedly different from those of lay officials as the interview responses of medical practitioners (in chapters 5 and 6) clearly show. There is an argument, therefore, for amending the training of AMPs and EMPs (and perhaps their selection also) so that the full legal significance of their actions is realised, and that some of the more cavalier approaches to medical adjudication which were evident in this study are effectively countered and not allowed to undermine the pursuit of accuracy and fairness.

The conclusion of this study is that the arrangements for medical adjudication within the social security system are beset with inconsistencies and anomalies. At present the system lacks most of the features of the lay adjudication system; there is no comparable training programme, nor comparable advice network or monitoring arrangements to promote the achievement of consistently high quality decision-making. Instead Departmental officials fulfil these roles, a practice which can only attract the criticism that it undermines the independence of statutory authorities (the adoption of the 100-yard rule in mobility allowance decision-making amply illustrates this).

If the problems of medical adjudication are to be resolved, then the lay adjudication system could serve as a model (notwithstanding its weakness identified earlier) for a re-designed medical adjudication system. The logic behind the rationalisation of the tribunal system, ie bringing lay and medical tribunals within a single Presidential system under OPSSAT, could be extended to the first tier of decision-making by the introduction of a 'Medical CAO', mentioned earlier, to operate alongside the existing OCAO organisation.

### **(c) The Advice and Monitoring Network**

Since 1984 the advice and monitoring functions for all social security benefits has been carried out by the Office of the Chief Adjudication Officer, an important development in the pursuit of a uniform approach to the administration of social security. Whilst it is the weaknesses of the OCAO arrangements that I will dwell upon below, this criticism is not intended to diminish or devalue their usefulness and potential in the pursuit of administrative justice.

One criticism of OCAO is a limitation not of its own making, viz. its narrow remit in monitoring the standards of adjudication only. Yet this study has shown that the formal process of adjudication comprises only part of the decision-making process. OCAO's contribution would be all the greater if it embraced the process of information collection, the decisions made on behalf of the Secretary of State, and the time taken to conclude a case. At present OCAO produces a report of its team's comments but takes no part in any response or action following its submission. There should be a duty on the DHSS to rectify any errors of decision-making identified by monitoring teams, and to report its actions back to the CAO. Responsibility for initiating a review should not, in such cases, lie with the claimant; an error should prompt an automatic review.



The opinions of both adjudication staff and the monitoring teams clearly indicate that the present definition of 'adjudication comments' and the manner in which they are presented (ie by being given equal weight in the overall calculation of the 'error rate') undermine the effect that such reports should be expected to make. No matter how insignificant or how serious the error, it is treated equally in a monitoring report, for example, a comment reflecting a clerical mistake such as quoting a wrong date, or the wrongful denial of a substantial benefit would 'score' one comment each, and hence an aggregate score of total comments would fail to indicate the seriousness of failures in adjudication. 'Adjudication comments' should, therefore, be categorised in such a way as to reflect the differential importance of 'technical errors' and more substantive mistakes. In this way the more serious misdemeanours will be given due weight and therefore greater respect and authority afforded the reports of OCAO and Regional monitoring teams. Consideration should also be given to increasing the frequency of monitoring teams visiting in the light of the unsatisfactory monitoring by many HEO/AOs who have neither the training nor the experience to fulfil a monitoring role.

At the local office level the problems caused by the recent changes under the 'devolution' policy of the DHSS are made clear in the responses of adjudication officers, HEOs and regional office staff in relation to industrial disablement benefit adjudication. The loss of the advisory role at Regional level and the subsequent delegation of this function to local office HEO/AOs has clearly led to a diminution of the quality of advice available to the adjudication officer. This contrasts with the experience in the Mobility Allowance Unit where the PAO section has retained its advisory role and continues to provide a fund of expertise that is rapidly being lost within the local office network. It seems that the decision to give HEOs advisory (and monitoring) duties was misguided in that it underestimated the demands that this would place on them in trying to fulfil both adjudicatory and management functions.

The weaknesses of this aspect of the devolution policy are revealed in both the local offices and the London South Benefit Offices. In the former, as with their monitoring function, HEO/AOs frequently find themselves not fully competent to answer the enquiries of their adjudication officers, through lack of training, lack of experience of a particular benefit, or lack of recent practical experience (for example, as case-law develops). In the latter, HEO/AOs are more often than not by-passed by adjudication officers who seek the help of their more experienced adjudication officer colleagues. As a result HEOs become increasingly inexperienced as problems and changes are not brought to their notice. Although some offices visited functioned well under the new arrangements, the reinstatement of RAO advice sections could only lead to an overall improvement in the quality of decision-making.

#### (d) The Tribunal System and the Front Line

The conclusions of the study on the appeal tribunal system are perhaps surprising. The impact of SSATs was found to be not in their decisions but in the prospect of an adjudication officer having to explain his or her initial decision to a tribunal, particularly if the adjudication officer was also a presenting officer. Their contribution to administrative justice, therefore, appears to be twofold; firstly in providing a means of redress for aggrieved claimants, and secondly in promoting (indirectly) the pursuit of accuracy by adjudication officers who would clearly prefer to make their decisions (in this case denials of benefit) as soundly based as possible rather than face the prospect of defending something less certain before a triumvirate of tribunal members. And in the pursuit of more soundly based decisions in marginal cases, adjudication officers tend to pay greater attention to the need for their own impartiality, for the participation of claimants, and for the desirability of supplying them with more detailed explanations of decisions.



As this study has shown, however, this effect is not repeated on the medical side; AMPs and EMPs are not even required to explain their decisions on paper if an appeal is raised, let alone appear before an MAT. The value of MATs as promoters of accuracy, therefore, is extremely limited.

#### **(e) Organisational Effects**

The diverse organisational arrangements encountered in this study for the administration of benefits have allowed a comparison between a centrally-based administration (mobility allowance), a diffuse organisation (industrial disablement benefit in Scotland and the North East) and an intermediate semi-centralised structure (in London South). Whilst making comparisons is a tempting exercise one rider should be added in relation to mobility allowance decision-making, namely, that although the paper work and final decision are centrally-based, the individual does receive a more 'local' contact in visiting the Medical Boarding Centre for completion of the MY22 form, and it is here that the bulk of information collection begins and ends. The criticisms of mobility allowance decision-making must therefore take account of this 'local' element in a centralised service. And similarly, because industrial disablement benefit decision-making is concentrated within three Benefit Offices in London South, it does not mean that the claimant necessarily has no contact with DHSS staff, only that contact with the office where the decision is made is rendered impractical for most claimants.

Figure 7.1 overleaf gives a simplified summary of the findings of this study on the administration of industrial disablement benefit and mobility allowance.

FIGURE 7.1 - The relationship between organisation and administrative justice

	<u>Accuracy</u>		<u>Fairness</u>		
		Prompt- ness	Impart- iality	Partici- pation	Account- ability
Mobility Allowance Unit	+ve	-ve	+ve	-ve	-ve
IDB - Scotland and North East	0	+ve	0	+ve	+ve
IDB - London South	+ve	-ve	+ve	-ve	-ve

Key: +ve = the current organisation generally makes a positive contribution to the achievement of administrative justice  
 -ve = the current organisation generally makes a negative contribution to the achievement of administrative justice  
 0 = the current organisational arrangements generally make neither a positive nor negative contribution to the achievement of administrative justice

The advantages and disadvantages of the Mobility Allowance Unit and the London South arrangements are the same: the concentration of decision-makers in one location (or only a few) creates a pool of expertise that can be utilised by all and hence promotes more accurate decision-making (see chapter 5, table 5.10), and the physical separation of decision-makers from claimants reduces the possibility of value judgements intruding as extraneous decision criteria and affecting decisions. It should be noted, however, that at some points in the process, bias and prejudice may still intrude; for example, during medical examinations, since these are inevitably face-to-face, and in the interviews between claimants and clerical staff of other offices which are occasionally necessary in industrial disablement benefit decision-making. Because information collection and decision-making are conducted on different sites there is inevitably a delay built in to the process as case-files are moved from one location to another. Further drawbacks occur in relation to participation and

accountability, although for different reasons in relation to the two benefits. On mobility allowance the fault is not due particularly to the organisational arrangements (except on the few lay questions that need to be considered, for example, age, or residence and presence) but is attributable to the role of EMPs who conduct their examinations with little or no regard for the desirability of ensuring that claimants have been able to give all the information that might support their claims, or for explaining why they are asking certain questions and the exact nature and purpose of the walking test. In contrast it is the relatively poor quality of interviews conducted in local offices in London South away from the three Benefit Offices that is detrimental to administrative justice. While local office staff lose expertise on industrial disablement benefit as it becomes a lower and lower priority for them, then the encounter between official and claimant will eventually be reduced to one where neither side knows the purpose and relevance of the series of routine and ad hoc questions posed by the distant adjudication officer. In such circumstances participation and accountability are bound to wither.

The strengths and weaknesses of local office processing of industrial disablement benefit are somewhat different. Except in the offices with large workloads, adjudication officers are usually working in isolation although they can call upon the HEO/AO (acting in an adjudicatory, not management, role) for assistance when necessary. Although it would be unfair to conclude that this leads to poor decision-making it is clear from chapter 5 that results from monitoring exercises reveal that the greater the number of adjudication officers working alongside each other then the fewer errors that are detected. There is, however, an advantage in locally-based administration in that the knowledge of local industries, labour market conditions etc. that is accumulated in a local office can prove valuable in resolving problems with the evidence germane to a claim. And even where local knowledge does not supply the answers to difficulties with the evidence, it may guide the adjudication officer

(or the disablement benefit clerk) as to the most appropriate person to approach for assistance. In effect, local office adjudication officers are better placed to elicit the true facts of a case.

An area where local administration compares potentially unfavourably with a more centralised structure is impartiality. Many adjudication officers report that when they have occasional contact with claimants, this may influence the way in which they treat a case. On the other hand, many adjudication officers welcomed the opportunity of talking to claimants face-to-face, since they felt it enhanced the chances of getting at all the relevant information needed to make an accurate decision. There is clearly a tension here between the need to elicit the full facts of a case, which adjudication officers are probably best placed to judge since they will be au fait with all the aspects and nuances of the claim, and the need (and desire) not to become personally involved with a claimant to the extent that judgement may become clouded. In the SSAT setting this tension is resolved, or at least ameliorated, by the presence of not one but three decision-makers, an option impractical at the front line. The attitude and temperament of individual adjudication officers are important here since clearly some found the tension difficult to resolve whilst others coped without undue problems. If all adjudication officers could be relied upon to maintain complete impartiality then the problem would be eliminated, but as Robson noted (see chapter 2), this would require something of an 'unnatural objectivity' which is hard to achieve in practice. The alternative, and one which this study concludes to be the most efficacious, is to approach the problem indirectly and argue that an increase in accountability, in the giving of reasons for decisions and explaining the decision-making process as it progresses, would help adjudication officers identify (where it may otherwise have been unconscious) where personal values have intruded in the decision-making process and to ensure that their decisions (and the way in which they reached them) are based soundly and solely on the legislative decision criteria.

As explained in chapter 2, accountability can be enhanced by the increased participation of the claimant in that it provides the opportunity for contacts with officials to be used to explain the progress of a claim, what further information is required, and why it is needed. It is here that adjudication officers in the local office is better placed than those in the London South Benefit Offices or the Mobility Allowance Unit since it is easier for them to call claimants in for an interview, or, on occasions, visit them or their place of work. The experience of local office adjudication officers (and the observations by Benefit Office adjudication officers that they occasionally felt obliged to make decisions on less than satisfactory information), leads to the conclusion that the advice in the Insurance Officers' Guide, that adjudication officers should refrain from coming into contact with claimants, should be rescinded in deference to the need for full information, and to provide the opportunity of explaining the decision-making process. Any potential loss of impartiality should be effectively countered by the greater participation of claimants and by better accountability to them.

The comparison between a dispersed administration and centralised approaches demonstrates the many forms of bureaucratic enterprise which can affect the achievement of administrative justice in different ways. This study provides a qualitative endorsement of both (or more strictly, all three) types of organisational arrangement which were encountered. Subjecting each to the demands of administrative justice reveals where they could be improved.

Whilst this section has dealt with the weaknesses of aspects of the social security decision-making system that are general to a number of benefits, the next section summarises how administrative justice could be enhanced by detailed changes to the decision-making arrangements of industrial disablement benefit and mobility allowance.

## 2 - Industrial Disablement Benefit and Mobility Allowance Decision-making

### (a) Industrial Disablement Benefit

A summary of the diverse conclusions to this thesis might be that the DHSS, in its administration of social security benefits, should improve the accuracy and fairness of its decision-making. The practical pursuit of this objective could involve particular changes that may complement each other. For example, I have suggested that, since for the individual the substantive outcome of the decision-making will be his or her major concern, then the pursuit of accuracy should be a priority. The accuracy of the decision, though, depends on fulfilling adequately the two stages of the decision-making process, the collection of information and the application of the decision criteria. The enhancement of the quality of information can be achieved by the greater participation of the claimant. Participation in turn is enhanced by accountability since an understanding of the process will enable the claimant to participate more effectively. And in consequence decision-makers will be prompted to greater impartiality by the necessity of having to explain their actions.

The interdependence of accuracy and fairness is particularly important in industrial disablement benefit decision-making since many of its problems stem from deficiencies in the evidence (which is often either incomplete, inconsistent or contradictory) rather than the interpretation of the law. For example, constructing a complete and accurate picture of the occurrence of an industrial accident, or compiling the details of a claimant's previous working history for prescribed disease adjudication, or the assessment of the previous potential earnings of a claimant in a special hardship allowance case, all present potentially difficult evidential problems. There are also, of course, as chapter 5 showed, difficulties in the interpretation of some industrial injuries legislation such as the meaning of 'out of



and in the course of' employment (on industrial accident claims) or 'wholly or mainly in the vicinity of' prescribed machinery (on occupational deafness claims). Here, greater accountability, in the giving of reasons for the decision could, as Franks argues (see chapter 2, p.60) encourage more carefully thought out decision-making.

Other specific improvements in industrial disablement benefit administration would flow from the discussion above about changes to the whole social security system. For example, if the OCAO was concerned with the time taken to process claims then the local offices would be obliged to pay more attention to the avoidance of delays in processing and greater efforts to secure the requisite information from outside individuals and organisations. Similarly, the separation of the adjudication officer and supervisor roles, and the re-introduction of the Regional advice role would allow adjudication officers greater time to devote to decision-making, and to be able to draw on expert advice on difficult cases. Medical adjudication on industrial disablement benefit, as for mobility allowance also, requires the substantial restructuring outlined above.

#### **(b) Mobility Allowance**

The major criticism of mobility allowance decision-making is directed not at the internal operation of the Mobility Allowance Unit but the way in which a fundamental problem of the interpretation of the legal phrase, 'virtually unable to walk', has been treated. The 'policy space' created by this form of words, as explained in chapter 6, has been filled by DHSS officials urging the use of 100-yards as a criterion by which to judge claimants' walking ability. Whilst this was an entirely practical response to a genuine difficulty, it is disturbing that, firstly, it is treated so covertly, thereby denying claimants any knowledge of one of the criteria by which they are being assessed, and secondly, that it has proved immune to scrutiny by the



higher levels of the decision-making system, most notably the Social Security Commissioners.

Furthermore, although it is a development of part of the mobility allowance legislation the Insurance Officer's Guide has nothing to say on the subject. Since a claimant who proceeds on his walking test for more than 100 yards is almost certain to be denied the benefit and since he will be notified only that he has failed to satisfy regulation 3(1)(b) of the Mobility Allowance Regulations 1975, it can be said that the full reason for his failure will remain unknown to the claimant, and hence accountability is poorly served. Accordingly, the 100-yards criterion should be included in the IOG (and hence be available to the public), and where applicable, reference to it should be included in the explanation of any failure to satisfy 'virtually unable to walk' criterion.

The anomaly of the mobility allowance medical boards as the first tier of appeal has already been mentioned in the commentary on the medical adjudication system. The aggrieved individual gains an advantage in having access to what is in effect an extra tier of decision-making, but is seriously disadvantaged by the denial of access to any of the casepapers that the board will have before it, and to any representation. To obtain these he must display commendable perseverance by pursuing his claim (assuming that the medical board turns him down, which happens in around 60% of cases) to an MAT. This anomaly could be removed either by abolishing the medical boards or by assimilating them with the tribunal system within OPSSAT and granting aggrieved claimants the same rights afforded to SSAT and MAT appellants. If this latter course were taken, however, another anomaly would be created within the social security system (that of having, in effect, two levels of MAT to hear mobility allowance appeals) which would be difficult to justify unless the opportunity was extended to appellants in cases involving other benefits.

Mobility allowance decision-making relies almost entirely upon medical information (very few claims fail on the lay conditions) which the claimant has little opportunity to affect and which is very poorly explained in the medical examination. The demands of participation and accountability would require, therefore, an explanation of the significance of the claimant's statement on the medical report form and a greater role in its completion by the claimant, and a full explanation of the significance of the various aspects of the medical examination and walking test. Part 4 of the medical report where the EMP gives his opinion as to whether or not the statutory requirements are satisfied is a useful check on the accuracy of the Mobility Allowance Unit assessment, but where the recommendation is for disallowance, then some explanation should be required of the EMP which could form the basis of the reasons for disallowance eventually communicated to the claimant.

The anomalous position of the Lay Scrutiny section in the Mobility Allowance Unit was discussed earlier, and the suggestion made that lay scrutineers should be designated adjudication officers and hence come within the jurisdiction of the Chief Adjudication Officer.

This section has drawn together the implications for the social security system in general, and for the administration of industrial disablement benefit and mobility allowance in particular, which have emerged from the application of an analytical framework based on administrative justice. In such a way, it is hoped that the utility of the framework has been demonstrated. The final section below presents a summary of the contribution of the study to the theoretical development of the concept of administrative justice.

### Part III - THE CONTRIBUTION TO THEORY

#### 1 - The Validity of Administrative Justice

One of the reasons why Mashaw's 'Bureaucratic Justice' has been a potent influence on the shape of this thesis is that it provides a much needed definition of administrative justice which is very persuasive, but which also invites critical examination. The analysis have set out in chapter 2 is, in effect, an attempt to address a persistent set of questions raised by Mashaw's own theorising, which can perhaps best be summarised as follows: even if Mashaw's three models of administrative justice are acceptable as coherent theoretical constructs, how are we to make an assessment about the right balance between them, and how can we make choices between the desirable (and undesirable) elements of each; in short, are there any fundamental criteria that we can use as a basis for comparison?

Framing the questions in this way, and failing to find an answer in Mashaw, largely accounts for the way in which the theoretical analysis is developed in this study. In contrast to Mashaw's attempt to generate alternative conceptions or models of administrative justice I have sought to show that administrative justice encompasses a set of normative demands that can be considered as applicable in any administrative setting, ie the demands of accuracy and fairness (in its four elements of promptness, impartiality, participation and accountability). An administrative agency, therefore, can be evaluated against these demands, whether it is organised as a bureaucracy or within some more flexible framework (such as in the provision of medical services).

This approach avoids the problems of Mashaw's model-building outlined in chapter 2. Firstly, by differentiating between different types of decision criteria the lack of clarity in Mashaw's 'cognitive techniques' is avoided. Essentially, I am positing one fundamental

model of decision-making, ie the application of a set of decision criteria to a body of evidence. The inevitable uncertainties in the evidence give rise to problems of relevance and validity, whilst unclear decision criteria demand the exercise of interpretation or judgement. This generalised notion, therefore, embraces Mashaw's separate categories of 'cognitive technique' and in particular demonstrates the similarities between 'information processing' and 'contextual interpretation'. Secondly, Mashaw's problems of organisation or structure are avoided, since administrative justice, as developed in this thesis, does not prescribe a particular organisational structure or the precise relationship between the administrative agency and individual citizens; for example, interpersonal contact between officials and claimants or the independence of the decision-maker are not associated with any particular organisational structure. On this approach, it does not matter, for example, whether mobility allowance claims are decided by a lay official sitting in Blackpool on the basis of a medical report prepared by an EMP in Reading or, to pick a hypothetical example, by a locally constituted panel of doctors, social workers and DHSS officials - what is important is that whatever organisation operates in practice, it should be able to demonstrate that it produces accurate decisions and produces them fairly. And thirdly, the legitimating values or primary goals postulated by Mashaw are subsumed within a single, if lengthy, objective. Administrative justice, it is argued, is satisfied if the individual receives an accurate decision, promptly (ie without any delay caused by the administrative agency), and impartially considered by the decision-maker, and that during the process the individual has been able to participate fully in providing information and being able to comment upon other information affecting his or her claim, and has had the process explained as the claim has progressed, and received an adequate and comprehensible account of the reasons for the eventual decision. This should be the challenge for all administrative agencies regardless of whether they are allocating welfare benefits, health care or deciding on a disputed claim.

The analysis has also provided an alternative way of dealing with what is seen by some as the problem of discretion, but which I have preferred to call the inevitability of making choices. Administrative justice, in other words, does not necessarily demand the confining, structuring and checking of discretion (Davis, 1971) but rather that where choices have been made, then it has also been made clear to the individual why those choices have been made, and what evidence and decision criteria they were based upon. Treating discretion in this way, it is argued, is in effect acknowledging the inevitability of discretion in decision-making whilst trying to ensure that extraneous decision criteria (ie the informal decision criteria of value systems) do not intrude into the valid and legitimate decision-making process. The response to discretion, therefore, should be to analyse the series of sub-decisions which contribute to the final decision, to identify where problems with the evidence, or problems with the decision criteria exist, and to stress the level and depth of explanation that is required for each.

## 2 - Problems with Administrative Justice

### (a) Administrative justice and 'efficiency'

One of the objections aimed at Mashaw's model of Bureaucratic Rationality in chapter 2 was the unexplained appearance into its defining characteristics of 'efficiency'. Whilst this criticism is maintained, it must be acknowledged that Mashaw has made an important attempt to inject an element of economic analysis into the treatment of administrative justice. The attempt, however, is not entirely successful: his argument appears to reduce to the contention that bureaucracies comprised of officials make decisions more cheaply than professionals or those involved in settling disputes. So, for example, if one wanted to inject an element of interpersonal contact into the bureaucratic decision-making process then costs would rise

and hence efficiency fall. However, as was argued in chapter 2, even at this level, and on Mashaw's own terms, the argument is not convincing since, to pursue this example, whilst costs may indeed rise through such a manoeuvre it might also be expected to lead to an increase in the level of accuracy as face-to-face contact allows more and relevant information to be supplied to the decision-maker. This would enhance, not detract from, the achievement of the Bureaucratic Rationality model of administrative justice which has accuracy as one of its legitimating values.

The question prompted by Mashaw is nevertheless important and one which remains to be tackled satisfactorily. The question is really twofold; firstly, what, in the context of welfare administration, do we mean by efficiency? and secondly, if we accept that efficiency is a relative notion (ie we cannot say that one form of organisation is efficient in an absolute sense, but only more or less efficient than it has been in the past, or than some other organisation) what level of efficiency can be taken as acceptable? The problem of defining efficiency in a welfare setting is that the economists' approach of relating output to costs is in itself problematic, as it can be difficult to define exactly what 'output' is. (For example, how to measure the output of health services has been a keenly debated issue for many years.) However, the 'output' of the social security system is perhaps easier to handle if we consider it as a satisfactorily processed claim. This is the official approach; one indicator of 'efficiency' published by the Government in the annual White Paper on Public Expenditure compares the cost of the administration of each benefit with the expenditure on the appropriate benefit payments. It is clearly a spurious measure as one example will demonstrate; if the level of a benefit is increased by several pounds one year, it is unlikely that any more effort will be required to process a single case since only the calculation of benefit will have changed; hence although administrative costs will remain the same, expressed as a



percentage of the (now increased) benefit expenditure they will appear to have fallen.

That this thesis has not provided an answer to the problem of efficiency needs a word of explanation. The reason primarily stems from the consideration in chapter 2 of the question of to whom a decision process should be acceptable (which was raised by Mashaw's definition of administrative justice). Of the several possible answers it was argued that the individual should be given paramountcy and that from the perspective of the individual any organisational features designed to contain costs but which actually or potentially cause injustice (in the sense that the individual is denied a rightful benefit or service) were to be considered unacceptable. If decisions on social security claims are as important as Campbell argues (see chapter 1, pp.10-11) then it would be no defence for an administrative agency simply to plead costs as a reason for not meeting the demands of administrative justice.

That administrative justice does not tackle the problem of costs, however, is not necessarily a weakness. Rather, it should bring into the open the question of the extent to which administrative justice should be sacrificed to keep costs at a certain level, or how much the government should devote to the administration of welfare systems. If administrative justice as an analytical tool identifies deficiencies in administrative agencies, then these agencies should be required to account for those deficiencies at a level of explanation higher than 'it would cost too much to improve matters'.

#### **(b) The qualitative nature of administrative justice**

A further difficulty prompted by the theoretical treatment of administrative justice is that of making use of the criteria of accuracy, promptness, impartiality, participation, and accountability in a



practical sense. Again though, the difficulties inherent in turning these criteria into quantifiable measures presents an essential challenge to administrative agencies, to define and demonstrate them in the particular context of their service provision. Depending on the nature of the decision criteria, accuracy can be alternatively easy or almost impossible to define; in a formalistic decision-making process the correspondence of the decision to the facts of the case could be taken as the basis for a working definition of accuracy. More problematic is the purposive decision-making process where the intended outcome (or purpose) of the process would be the true test of whether the accuracy demand of administrative justice has been satisfied. The problem with this approach can be illustrated using the example of health care. A patient might receive the best of treatment for his condition but still not be cured; in such a case, is the welfare agency to be criticised for failing to provide justice for the patient? Clearly this would be unreasonable and not particularly helpful in the pursuit of improved decision-making. A better indicator would be an assessment of whether the two stages of purposive decision-making, described in chapter 2 in relation to a professional knowledge based system as the 'diagnosis' and 'response' stages, are carried out in accordance with the current state of knowledge.

Promptness is comparatively easy to quantify although it must be considered something of a flexible criterion. As explained in chapter 2 it may be appropriate to attach definite time limits to decision-making but frequently this is not possible. However, as the discussion of the Oglesby scrutiny of mobility allowance shows (chapter 6, pp.285-6), targets for improved processing times can be effective in reducing the time taken to process claims and thus contribute to greater promptness.

Impartiality, participation and accountability are essentially qualitative criteria. One measure of 'impartiality' would be the

demonstration that a decision on a claim was entirely the result of applying the appropriate decision criteria to the evidence, ie that no extraneous decision criteria intruded into the process. In this way accuracy could serve as a proxy measure of impartiality, ie if accuracy is confirmed then, by inference, the decision is based soundly on the decision criteria and evidence, and hence impartiality can be assumed.

It can be seen that accuracy, promptness and impartiality could be monitored from within the organisation by a retrospective examination of casepapers using a previously defined measure of accuracy and a quantitative expression of appropriate time limits. However, an assessment of levels of participation and accountability is not so amenable to such internally-based scrutiny. Whilst, as this study has demonstrated, it is possible to ascertain the views of officials on how well participation and accountability are served by the current organisational arrangements, no real sense can be gained from these of how the claimant perceives his treatment. There is perhaps a need, therefore, if administrative justice is to be taken seriously, for some form of continuing consumer survey for welfare services (perhaps along the lines of the Family Expenditure Survey or the General Household Survey), which could address, inter alia, the issues of participation and accountability and levels of satisfaction amongst claimants.

#### Part IV - FINAL COMMENTS: PURSUING THE SUBTLE ENTERPRISE

The treatment of administrative justice presented in this thesis presents a series of challenges for welfare administration agencies; a challenge to articulate what the concept (in its elements of accuracy and fairness) means in their particular setting, and a challenge to demonstrate how their internal operations meet these demands. Alternatively, they should acknowledge where deficiencies exist, and either remedy them or produce compelling arguments to explain why they should be considered acceptable.

The challenge is not only relevant to current administrative arrangements; prospective changes in administration should also be able to meet the requirements of administrative justice. Proposed legislative amendments or new provisions could be scrutinised in two ways; firstly to identify where problems with evidence or with the interpretation of the law are likely to occur, and secondly, to identify what response would be necessary in institutional terms (for the DHSS and also for the Office of the Chief Adjudication Officer and the Office of the President of Social Security Appeal Tribunals) to ensure that accuracy and fairness are not undermined. Furthermore, any administrative rules that act as additional substantive decision criteria should be subject to the same administrative justice requirements as legislative provisions.

The theory and practice of administrative justice developed here has focused on the front line of social security decision-making in a conscious effort to demonstrate the importance of routine administration. However, the demands of administrative justice are relevant for all decision-making processes, whether they adopt case-law, administrative rules, or professional knowledge as decision criteria within a framework of statutory legal rules, and whether they are the first or subsequent tiers of decision-making. Hence, the challenge to

administrative agencies outlined above is also relevant for bodies as the Social Security and Medical Appeal Tribunals.

Whilst this study has not probed the appeal tribunal system's contribution to administrative justice, previous analyses indicate that this tier of social security decision-making is relatively open to investigation and evaluation. It is suggested, therefore, that fruitful research could be carried out on tribunals using the normative framework provided by administrative justice. The case for such research is strengthened in appeal cases where new information is presented, since in effect the tribunal is not scrutinising a previous decision but having to make a fresh assessment, ie the decision they come to in such a de novo hearing is akin to an initial decision, but there are no safeguards such as a monitoring system to promote and check accurate decision-making. Where the level of appeal is to a tier of internal administrative review, however, research by outsiders becomes reliant on the co-operation of the agency and therefore potentially more difficult. The argument must, therefore, be that where individuals are dependent on the decisions of welfare agencies, then no matter what the particular decision criteria may be, individuals should be afforded the same guarantee of administrative justice as when the decision criteria are statutory legal rules.

A warning was sounded in the introductory chapter about the dangers of claiming too much for a theoretical development that relies on related empirical evidence. The conclusions drawn, therefore, acknowledge that this treatment of administrative justice would need further empirical testing in other areas of social security, and within other welfare and regulatory organisations. What has been presented here has been in effect, a 'special' theory of administrative justice; what is needed is a general theory covering all instances of administrative decision-making with which administrative justice relating to social security would be compatible and consistent. The wider applicability of administrative justice is prompted by a remark by Robson (1979) in

his reassessment of his book Justice and Administrative Law (1928). He noted that in the fifty years which had elapsed since the book was published, administrative tribunals has stepped outside the narrow limits of addressing disputes between private individuals and public bodies and now were also concerned with individuals' disputes with private persons and organisations (such as employers). This strongly suggests that administrative justice should also be applicable in this area of social life, and that, for example, the relationships between individuals and banks, building societies, insurance companies etc. could (and should) be evaluated according to the normative demands of administrative justice. The point is reinforced in a welfare setting by Titmuss's cogent analysis (1976) of the 'social division of welfare' where he argued that our traditional view of welfare which focuses on public social services excludes other important mechanisms through which our welfare is promoted, in particular 'fiscal' welfare (such as the income tax system) and 'occupational' welfare (such as occupational pensions, fringe benefits etc.). So, since significant aspects of our welfare are delivered by private organisations then the argument for extending the demands of administrative justice to the private sector becomes compelling.

This wider relevance of administrative justice confirms that Mashaw's 'necessary beginning' (1983, p.16) was indeed necessary. In this thesis I have tried to build upon his 'beginning' in an analysis of decision-making prompted by Mashaw's innovative and searching inquiry into administrative justice. The analysis presented, it is argued, meets Kamenka's criteria for valid and effective normative theory (chapter 1, pp.14-15); it has internal coherence and consistency and can be a powerful empirical tool which, as chapters 5 and 6 demonstrate, is capable of generating a practical agenda for reform. Reconciling 'administration' and 'justice' may be a subtle enterprise but it is far from doomed and in the modern state such enterprise is becoming ever more necessary.

## NOTES

### Chapter 1 - Advancing the Front Line

- (1) I am aware that in this thesis I am assuming an administrative definition of 'social security', ie National Insurance benefits, supplementary benefits and housing benefits, and acknowledge that in doing so, there is a danger of further reinforcing the narrow view of 'welfare' which only encompasses publicly provided services and benefits and ignores the contribution to 'welfare' from the fiscal system and from occupational sources (Titmuss, 1976; Sinfield, 1978).

The administrative approach to definitions of social security also leads to confusion when comparative analyses are attempted since definitions vary from country to country. The answer, according to Sinfield (1985) is not to refine administrative definitions but to abandon them, and instead seek to answer Townsend's challenge (1975) for a functionalist definition, ie attempt to answer the questions 'what security and whose?' and 'why social?' (Sinfield, 1985, p.2).

However, because this thesis is concerned specifically with the administration of the DHSS in its handling of claims for benefit, I will proceed with an administrative notion of social security benefits.

- (2) For example, in the Old Age Pensions Act 1908 and the National Insurance Act 1911.
- (3) Cmd 6404 (1942) Social Insurance and Allied Services, (the Beveridge Report), HMSO. The other 'giants' which Beveridge sought to banish were Ignorance, Disease, Idleness and Squalor.
- (4) The figures quoted in this paragraph are taken from Cmd 9519 "Reform of Social Security - Background Papers", Paper 5, para. 5.1.
- (5) The most comprehensive pieces of empirical research on the financial circumstances of social security recipients have been Townsend's large-scale survey reported in Poverty in the UK (1979), and Mack and Lansley's analysis of survey data collected for the television series 'Breadline Britain' (in Poor Britain, (1985)); see also Berthoud (1984). The impact of income maintenance on poverty is explored in Beckerman (1980), and more recently in Nolan (1986). In Dilnot et al (1984) and George and Wilding (1984) the relationship between social security and work incentives is examined.
- (6) The large amount of research on SBATs in the 1970s is explained by a combination of factors: the upsurge of interest from welfare rights groups in the tribunal system, the involvement of



researchers as representatives, the relative ease of access to tribunals, and the general growth of academic research into socio-legal issues (Adler, 1985).

- (7) For other useful contributions to the study of social security tribunals, see Farmer (1974), Adler & Bradley (1976), and Fulbrook (1978).
- (8) Adler further suggests that the academic discipline of sociology has made little contribution to rendering this opacity a little more pellucid; partly through its lack of opportunity (ie in the training of social security officials, and because of the dominance of the DHSS over research into its own activities), but also partly through its own failings in not recognising the significance of social security as a social institution, and in alienating the discipline from government departments.
- (9) Four small Review Teams were set up in 1984 to investigate supplementary benefits, provisions for retirement, benefits for children and young people, and housing benefit. The results were published in a series of Green Papers in 1985 as The Reform of Social Security (Cmnd. 9517-9520).
- (10) However, it was felt, especially in the 1970s, that concentrating welfare rights activity on appeals to tribunals, Social Security Commissioners and the Courts - the "test-case strategy" - would produce benefits for all claimants if the interpretation of certain parts of the social security legislation could be established in their favour (see, for example, Prosser, 1983). Whether the results of such a strategy are worth the amounts of time, effort and money that it requires is discussed in Harlow and Rawlings, 1984, p.269ff.
- (11) In 1985, of the 16.8 million social security claims, 74,500 were heard and decided by an SSAT (Social Security Statistics 1986, Tables 49.01A and 50.04).
- (12) Campbell's argument recalls the American case, *Goldberg v Kelly* (397 US 254 (1970)) in which the Court ruled that recipients threatened with the termination of certain public assistance benefits were entitled to a full trial-type hearing (ie at which oral evidence and cross-examination of witnesses was permitted, and a decision made by a neutral adjudicator, who would provide a written decision). However, the principle established in this case has not been extended to all American welfare benefits (Mashaw, 1974, p.805).



## Chapter 2 - Administrative Justice and Welfare Decision-Making

- (1) For an examination of welfare agencies based upon this duality, see Cranston (1985).
- (2) A useful exploration of administrative justice in a regulatory context is Kagan's (1978) study of the implementation of the Wages, Prices and Rents freeze order in the USA in the early seventies. The questions which Kagan posed are also of concern in a welfare context:

"Everyone agrees ... that agencies should proceed in an honest and equitable manner. The debate is about how the agencies should be constituted and controlled to promote these ideals. It concerns the proper structure of participation, fact-finding, and accountability in the regulatory decision process." (p.13)

- (3) Robson (1928) was an important early treatment of administrative justice; the Committee on Ministers' Powers, 1932 (the Donoughmore Committee) and the Committee on Administrative Tribunals and Enquiries, 1957 (the Franks Committee) were both important influences on the shaping of the system of administrative tribunals in this country.
- (4) See, for example, Titmuss (1971), Lister (1974), Adler & Bradley (1976), DHSS (1978), Supplementary Benefits Commission (1979), Bull (1980), Walker (1983), Ham & Hill (1984).
- (5) Jerry L. Mashaw is Cromwell Professor of Law at Yale University. He has written widely on the administration of social security in the USA. See, apart from Bureaucratic Justice, 'The Management Side of Due Process' in 59, Cornell Law Review, 1974.
- (6) See also the review of Bureaucratic Justice by Adler & Tweedie (1985).
- (7) It should be noted that in the USA social security system 'hearings' are not necessarily appeals. Hearings can refer to some first tier decision-making mechanisms where, for example, claimants are faced with having their benefit payments withdrawn; see also n.12 to chapter 1.
- (8) The models are offered as 'ideal types' in the sense that they are abstract yet coherent formulations that contain an internal logic to their structural features. They do not purport to describe reality but to provide models which can be used to analyse and understand observable patterns of behaviour. 'Ideal types' as an analytical tool derive from Max Weber; see On the Methodology of the Social Sciences (1949). Nicos Mouzelis, in Organisation and Bureaucracy (1967), usefully discusses the

concept, whilst an application of the technique in a social welfare context can be found in M. Adler 'Financial Assistance and the Social Worker's Use of Discretion' in N Newman (ed) (1975).

- (9) See Rogaly (1984).
- (10) See, for example, Baldwin & Hawkins (1984).
- (11) See chapter 1, pp.11-12.
- (12) For example, see reviews by Liebman & Stewart (1983), Kagan (1984), Verkuil (1984), Adler & Tweedie (1985), Stone (1984b), Zucker (1985), Ogus (1987)
- (13) This is not necessarily to concur with Dworkin (1977) that even in 'hard cases' there should still be one right answer that can be found within the law. There may still be uncertainty in evidence and decision criteria which seem to defy resolution and require adjudicators to make choices (or exercise their discretion) between alternative decisions (Hart, 1961).
- (14) 'Decision criteria' is rather an inelegant term but is nevertheless useful as a means of describing collectively the wide variety of factors that different decision-makers may use in decision-making; they may be, for example, a written body of rules, a set of precedents, a body of professional knowledge or the individual preferences of a decision-maker.
- (15) Here I wish to depart from Mashaw's characterisation of 'bureaucratic' rules, since not all administrative agencies will necessarily be wholly or mainly 'bureaucratic' in nature. Also, I wish to avoid the pejorative connotations that are sometimes associated with the term 'bureaucracy'.
- (16) In a useful discussion of the differences between 'principles', 'rules' and 'standards', Jowell (1973) advocates the definition of a legal rule formulated by Roscoe Pound (in Jurisprudence (1959), vol. 2). A legal rule is,

"... a legal precept attaching a definite legal consequence to a definite statement of fact." (p.201)

This could also serve, mutatis mutandis, as a definition of an administrative rule.

- (17) Baldwin & Houghton's (1986) full typology divides administrative rules into the following categories: procedural rules, interpretive guides, instructions to officials, prescriptive/evidential rules, commendatory rules, rules of practice, management or operation, and consultative devices and administrative pronouncements. Whilst not disputing the validity of

these categories, it is worth noting that 'procedural rules', unlike the other seven categories, do not constitute substantive decision criteria, although, as has been argued, procedures can have an indirect bearing on the outcomes of decision-making processes (see chapter 1).

- (18) This is an admittedly simplistic characterisation of professional knowledge which leaves aside the critical argument that it comprises not only a corpus of value-neutral propositions and relationships (comparable to 'scientific' knowledge) but also an element of socially-constructed knowledge which serves, *inter alia*, to maintain the power of professional groups within society; see, for example, Johnson (1972).
- (19) Following Pound; see n.16 above.
- (20) In distinguishing between accuracy and fairness as elements of administrative justice I am assuming that 'fairness' can be treated as independent of, but nevertheless contributing to, the concept of justice. As Dworkin explains:

"Most political philosophers ... take the intermediate view that fairness and justice are to some degree independent of one another, so that sometimes fair institutions produce unjust decisions and unfair institutions just ones." (1977, p.177)

Why 'justice' is linked to decisions and 'fairness' to institutions and not vice versa is not clear - it could be argued that the two terms are interchangeable. Nevertheless, inasmuch as 'justice' is frequently used in connection with substantive outcomes and 'fairness' with procedures, I will also follow this convention, whilst emphasising that one of the attractions of the concept of administrative justice is its potential of subsuming both substantive and procedural elements.

- (21) This echoes the observation in the Franks Report that there is not a single model that administrative tribunals should adhere to; rather the criteria of 'openness, fairness and impartiality' should be satisfied whatever the particular form a tribunal might adopt.
- (22) In his analysis of discretion Dworkin (1977, p.31) likens the concept to the hole in the doughnut which only exists because of the surrounding material; so, he says, with discretion, it is only within the surrounding constraints of rules, policy etc that discretion can operate; without reference to those constraints the concept has no meaning.
- (23) This characterisation of discretion within a welfare service corresponds closely to Bull's (1980) typology. Administrative rules are constructed under what he calls 'agency discretion',

whilst administrative and professional discretion Bull subsumes under 'officer discretion'. It must also be remembered that these two types of discretion must be consistent with the legal framework within which they operate, which it is the prerogative of Parliament to dictate under what might be called their 'legal discretion'. Bull's typology is further discussed in Part V.2 of this chapter.

- (24) The discussion on discretion here is presented from a micro-sociological perspective, ie concentrating on the impact of discretion on individual decision-making. For discussions of discretion in a wider context, see, for example, the essays in Adler & Asquith (1981).
- (25) See, for example, Titmuss (1971), Jowell (1973), Lister (1974), Adler & Bradley (1976), Donnison (1977), Bull (1980), Adler & Asquith (1981), Ham & Hill (1984), Goodin (1985), and Galligan (1986a).
- (26) Though influential Davis's was by no means the first treatment of discretion, see Bradley (1974, pp.37-38).
- (27) The negative aspects of discretion were cited extensively in the debates preceding the reform of Supplementary Benefit in 1980 (see, for example, Donnison (1982), Walker (1983), Harlow & Rawlings (1984)). Partington (1980, quoted in Harlow & Rawlings (1984, p.588)) summarises the anti-discretion arguments in the 1970s as follows:
  - (i) it leads to inconsistent decision-making on the part of officials and appeal tribunals;
  - (ii) it leads to arbitrary decision-making;
  - (iii) it leads to undesirable social control by officials;
  - (iv) it diverts attention away from more fundamental issues such as the adequacy of benefits;
  - (v) it encourages feelings of stigma in claimants;
  - (vi) it prevents claimants understanding how the scheme works;
  - (vii) it leads to feelings of jealousy between claimants.
- (28) There is ultimately a point, however, at which decisions become final. On questions of fact the findings of SSATs and MATs are not reviewable, whilst on points of law the Social Security Commissioners are, in the vast majority of cases the final arbiters, although, of course, cases can be pursued, with leave, to the House of Lords as the highest court.
- (29) The temptation to label certain types of public official as holders of 'strong' or 'weak' discretion is not particularly fruitful; in practice an official may have a wide scope for

choice in one decision and very little on the next. Harlow and Rawlings (1984) put the point with reference to judges:

"We should not assume that judicial discretion is invariably 'strong' or 'weak' ... we have seen judges using discretion in many different circumstances."  
(p.317) (original emphasis)

- (30) Adler & Asquith (1981) have drawn attention to the need for this power relationship to be articulated in the context of wider social, political and economic forces.

- (31) Frank (1963) argues strongly that 'fact-finding' is a crucial element in producing a decision and that uncertainties about decisions are often wrongly attributed to problems with the rules upon which they are based. Even the most honest of witnesses cannot be relied upon; for example, his genuine perceptions of events may not accord with reality (it is common after all for two eyewitnesses to an event to offer alternative accounts), his memory may be faulty or his account may be unclear, confusing or give a totally wrong impression of what he meant. Thus, Frank is led to the conclusion that 'facts are guesses'.

- (32) However, Street (1968) argues that welfare legislation does not allow straightforward decision-making.

"... decision-making is not ... some mechanical process; one cannot use a slot machine or even a computer in order to obtain an answer." (p.8)

- (33) The point is echoed by Baldwin & Hawkins (1984) who are forceful in their insistence that 'legal' considerations offer only a part explanation of discretion:

"If ... attention is focused unduly on legal and rational as opposed to other values, then a solid basis for such studies is not offered. Our position is that a proper appraisal of discretionary justice must recognise the part played in decision-making by moral, political, organisational, and economic values, in addition to legal ones." (pp.579-580)

- (34) In practice it is difficult to find examples of such a conjunction since, as Hart (1961, p.12) argues, there is always a 'penumbra of uncertainty' in even the most innocent-seeming provision. He cites the example of the requirement that wills must be signed; this seems straightforward enough until one asks what exactly constitutes 'signing' a will; can the signatory be given any physical assistance, for example, or can initials rather than a full name be acceptable?



#### Chapter 4 - An Introduction to Social Security Decision-making

- (1) The main exception is attendance allowance where decision-making powers are vested in the Attendance Allowance Board
- (2) The former Chief National Insurance Commissioner, Sir Robert Micklethwait, has suggested the term 'extended three tier plus' in an attempt to encompass the various elements of the adjudication system within one phrase. He writes:

"... 'extended three tier plus' ... describes exactly what it is: the three tiers consist of the insurance officer, the local tribunal and the Commissioner; there are extensions into the area of the medical appeal tribunal and the Attendance Allowance Board; and the 'plus' represents the control of the Commissioner by the courts." (1978, p.17)
- (3) Social Security Act 1975, s.98(1)
- (4) The difference between a 'claim' and a 'question' is straightforward; in some instances an adjudication officer must make a final decision on a claim, ie whether the claimant is eligible or ineligible for the benefit claimed and, where appropriate, what the legitimate rate of payment is; in other cases the adjudication officer is asked to decide a separate issue (or 'question') which may not be directly related to a claim. The most relevant example of this is from the Industrial Injuries scheme regarding an industrial accident where a claimant can ask for a decision on whether an industrial accident has taken place (as defined in the legislation) regardless of whether or not he wishes to pursue a claim for Industrial Disablement Benefit (see chapter 5).
- (5) The arrangements for 'reporting' decisions are currently under review by the Lord Chancellor's Department
- (6) For a brief discussion on the roles of medical practitioners in the social security system, see Burns (1981).
- (7) Severe disablement allowance was introduced to replace the non-contributory invalidity pension (abolished by the Health and Social Security Act 1984, s.11). It is designed to provide a regular payment to disabled people who have been prevented from building up National Insurance contributions which would have entitled them to an invalidity pension. Disability is measured according to the same assessment criteria that are used in the Industrial Injuries scheme.
- (8) Before the changes introduced by the HASSASSA Act 1983, a 'Medical Board' always comprised two doctors. Now two doctors only sit when the conditions of Regulation 32 of the Adjudication

Regulations (SI 1984/451) apply. Therefore, although strictly speaking a 'Board' rarely sits, referring a claimant to an AMP for a medical assessment is still called by officials and public alike 'boarding'. Furthermore, since the DHSS still calls the premises where examinations take place 'Medical Boarding Centres', it is likely that this familiar usage will continue for some time.

- (9) HASSASSA Act, 1983, s.25 and schedule 8.
- (10) The 'S' Manual and the Insurance Officer's Guide are to be replaced by the single, multi-volume Adjudication Officers Guide (AOG).
- (11) PAO Sections are staffed by experts in the centrally-administered benefits. However, they are not at present under the command of OCAO, but remain part of the DHSS establishment. This somewhat anomalous position is currently under review by the DHSS and the OCAO with the possibility of PAO staff being transferred to the control of Southampton.
- (12) Presidential systems operate in connection with, inter alia, Lands Tribunals, Mental Health Review Tribunals, Industrial Tribunals, Immigration Tribunals, and VAT Tribunals.
- (13) Constant attendance allowance and exceptionally severe disablement allowance are additions that can be claimed by recipients of industrial disablement benefit.
- (14) This is the figure for 1.7.84 (DHSS, 1984b)
- (15) More recent figures (for 1.4.86) give the following allocation of staff:

Local Offices	63,137
Regional Offices	2,779
North Fylde Central Office	4,289
Newcastle Central Office	10,070
Computer Centres	895

(Source: The Government's Expenditure Plans 1987-88 to 1989-90, Cm 56-II, HMSO, 1987)

The figure for Headquarters is 4,254, but this includes staff employed on health service business as well as social security staff. The text uses the 1985 figures in order to allow comparisons to be made with, inter alia, Department of Employment staff engaged on social security duties, and local authority staff on housing benefit administration.

- (16) Previously, LOIs were designated 'Executive Officers' (EOs) but the new grading, which attracts only a slightly higher salary, is



intended to reflect the added pressures of working in a local office and of being in contact with the public. The EO grade still exists for staff carrying out duties of a similar degree of difficulty and responsibility but lacking the stresses of the local office; the adjudication officers in the Mobility Allowance Unit at NFCO, for example, are graded EO. There is a similar distinction made for clerical staff between the higher graded Local Officer I (LOI) and a clerical officer.

- (17) Supervisory duties will include, for example, the distribution of work amongst clerical staff, ensuring a steady throughput of cases, dealing with queries from staff and from the public, and the checking and authorising of girocheque payments.
- (18) Combining the roles of adjudication officer and supervisor has been partly the result of the reduction in the amount of adjudication work falling on the CB side following, for example, the replacement of sickness benefit by statutory sick pay in 1982, and partly due to the conscious decision of the DHSS to widen the experience of staff previously engaged on just one activity.
- (19) Family income supplement is to be replaced by 'family credit' under the Social Security Act 1986.
- (20) In *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] QB 456 at 486
- (21) This applies especially to supplementary benefit and hence the DHSS in practice works to a much shorter target time of 5 working days for the processing of a claim.

#### Chapter 4 - Methodology

- (1) Partington's broader definition is preferred to Campbell and Wiles' early more limited formulation which tries to condense the 'socio-legal approach' as follows:

"... it deals with the actual operation of law and its effects on people - with access to legal services, with the treatment afforded to defendants in court, with welfare and poverty issues." (1975, p.549)
- (2) See Chapter 2 for a discussion of the Franks Committee recommendations.

- (3) Although Morton-Williams is referring to people, the same point applies when the research is concerned more with types of social situations than with the actors involved. For example, in their study of attitudes towards dying, Glaser and Strauss (1968) sampled, inter alia, situations where dying was expected and usually quick (an Intensive Care ward), or unexpected and quick (an Emergency department), or expected but slow (a cancer ward).
- (4) The term is Glaser and Strauss's (1967) which they explain as follows:

"The criterion for judging when to stop sampling the different groups pertinent to a category is the category's theoretical saturation. Saturation means that no additional data are being found whereby the sociologist can develop properties of the category." (p.61)

#### Chapter 5 - Industrial Disablement Benefit

- (1) Social Security Act 1986, s.53.
- (2) For an excellent short history of the development of the Industrial Injuries scheme see Brown (1982), chapters 1-3.
- (3) 'Social Insurance and Allied Services', (the Beveridge Report), 1943, Cmd 6404.
- (4) This idea was derived from the War Pensions scheme which utilised a system of percentage assessments for specific disabilities. Decisions were taken by specially formulated medical boards.
- (5) The appeals structure introduced in the 1946 Act is the familiar one of today. The claimant could appeal against the decision of an Insurance officer to a Local Appeal Tribunal and thence, on a point of law, to the National Insurance Commissioner; or against the decision of a medical board to a Medical Appeal Tribunal.
- (6) The introduction of special hardship allowance was something of a rushed exercise formulated at the eleventh hour to satisfy the demands of the lobby in favour of an earnings-related element to disablement benefit. It required a separate piece of legislation, the National Insurance (Industrial Injuries) Act 1948, s.1 (see Ogus & Barendt, 1982, p.298).
- (7) Exceptionally severe disablement allowance was introduced by s.6 of the National Insurance Act 1966, following the recommendations of the McCorquodale Committee on the Assessment of Disablement, 1965, (Cmnd 2847).

- (8) 'Reform of the Industrial Injuries Scheme', 1980, HMSO.
- (9) For example, in the DHSS discussion document 'Industrial Injuries Compensation', 1980.
- (10) Whilst Beveridge acknowledged the desirability of assisting all those with disabilities regardless of their cause, he nevertheless advocated the retention of the 'industrial preference'. The controversy surrounding this idea persists today and is one focus of attack for pressure groups such as the Disability Alliance and the Disablement Income Group who advocate, inter alia, a general disability benefit to replace the current collection of ad hoc benefits.
- (11) Industrial Injury Benefit was abolished by the Social Security and Housing Benefits Act 1982.
- (12) Departmental Committee on Workmen's Compensation (Holman Gregory Report), 1920, Cmd 816.
- (13) Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967). The test for occupational deafness used to be harsher, the claimant having to prove twenty years experience in the prescribed occupation.
- (14) For example, in the 1985 edition, apart from the two tables showing the new rates of benefit, only four of the remaining twelve had been updated from the 1984 edition.
- (15) The 1984 edition of Social Security Statistics included for the first time an analysis of industrial accidents and prescribed diseases according to different industries. Figures are only provided for 1980-1982 but nevertheless reveal some interesting trends. The following is a sample of the 27 industries analysed:

	Accidents			Prescribed Diseases		
	1980	1981	1982	1980	1981	1982
Mining and Quarrying	14030	13500	12660	650	550	500
Shipbuilding and marine engineering	1750	1070	1230	370	300	150
Textiles	1550	990	1090	250	140	100
Construction	6720	5680	5240	90	130	90

Source: Social Security Statistics 1987, Table 21.50 (Part 1)

There is a break in the series between 1982 and 1983 when a revised system of industrial classification was introduced reducing the previous 27 categories to only 9. A sample is reproduced overleaf.

	Accidents			Prescribed Diseases		
	1983	1984	1985	1983	1984	1985
Extraction of minerals ores and other fuels	4110	4120	4820	130	370	440
Metal goods, engineer- ing, and vehicles	9570	10200	9980	420	1680	1860
Other manufacturing industries	5270	5720	6680	260	340	370
Construction	4150	4650	5090	30	150	80

Source: Social Security Statistics 1987, Table 21.50 (Part 2)

- (16) See D. Neligan, Social Security Case Law, Digest of Commissioners' Decisions, DHSS
- (17) In a recent revised version of the BI 100A, which incorporates the BI 95 (which was not in use during the fieldwork stage of this research), there is even less space.
- (18) These figures are from the statistical year 1981/2 quoted by Wikeley (1988, forthcoming). They are from Health and Safety Statistics 1981/82, Health and Safety Executive, 1985, HMSO and are the latest available figures due to the year long industrial dispute involving DHSS computer operators in 1982.
- (19) Industrial Injuries Advisory Council (1973), Report on Occupational Deafness (Cmd. 5461).
- (20) Normal degenerative changes within the ear reduce the ability to hear certain frequencies of sound. The damage caused by loud noise often encountered in industry affects a different range of frequencies, thus allowing audiometric tests to indicate the underlying cause of a person's hearing loss.
- (21) Regulation 2, Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985 (SI 1985/967). The original prescription test required that exposure to noisy equipment lasted for at least 20 years but this was relaxed in 1983 (SI 1983/1094).
- (22) As one way of partly overcoming this problem one enterprising adjudication officer had acquired a trade catalogue from the Coal Board of percussive tools which he would show to claimants to identify which tools they had worked with.
- (23) Special hardship allowance is to be replaced by a 'reduced earnings allowance' introduced by the Social Security Act 1986, schedule 3.

- (24) In a sense this conflict is created artificially by a conflation of a medical board's assessment under social security law and the GP's response to his patients's clinical requirements. As a result both parties may be right in their opinions, ie the GP considers that the claimant/patient should not do any work in order to facilitate his recovery, but the medical board considers that his physical condition is such that he could physically do some work, whether this is advisable for his health or not.
- (25) The Regional Medical Service does not only provide this referee service for social security administration, but also performs a liaison function between the DHSS, the Prescription Pricing Authority, Family Practitioner Committees, and GPs.
- (26) There is a considerable amount of case-law on the question of 'regular occupation'; see Neligan's Digest, chapters 8-11.
- (27) The length of an SHA award is not fixed in statute. The Insurance Officer's Guide advises, however, that,

"...SHA should normally be awarded for 12 months, unless there are factors which indicate an earlier reconsideration of the case..." (para. 6362)

Occasionally, initial awards of two years may be made when 'it is abundantly clear on strong medical evidence that the claimant will not ... be able to resume his regular occupation ... and the difference between ... earnings is, and is likely to remain, appreciably in excess of the maximum rate of SHA.' (para. 6364) On renewal claims, awards may be made for up to six years (para. 6366). This most frequently occurs where the claimant is likely never to work again, or if he has passed pensionable age.

- (28) One clerk with long experience of interviewing claimants was more enterprising; over the years she had maintained a small notebook in which she kept a record of all the alternative occupations that had been suggested to her by claimants and which she merely showed to new claimants and asked them to pick out anything that they felt they were capable of. The notebook's contents had grown to a substantial size (over sixty alternative occupations at last count) and usually proved effective without any further intervention of the clerk.
- (29) This practice has been roundly criticised by Street (1968, p.31)

"It is difficult to see why a report by someone who has never seen a claimant, that he is suitable for a job that he has never been offered, and a job of whose availability he is totally unaware, and where there is no evidence that there are any vacancies in the job, still less that the claimant could successfully apply for one, can be regarded as cogent evidence."



- (30) The following examples are also taken from internal DHSS training material used by the Regional Medical Officer and his staff.

injury: fracture of left femur  
relevant loss  
of faculty: reduced movements of the left hip  
disability: impaired locomotion  
disablement: claimant can only walk ¼ mile or so

injury: musculo-skeletal injury to lumbar spine  
relevant loss  
of faculty: reduced and painful movement of lumbar spine  
disability: impaired spinal function  
disablement: unable to lift more than 20 lbs without pain

- (31) A drawback of the current monitoring arrangements is the partial random sampling of decisions in the selection of cases to be scrutinised. Monitoring teams are meant to look at 100 cases, 50 from defined categories specified by the CAO, and 50 selected randomly from the office record of adjudication decisions made, the LT 51. Random selection is intended to provide the CAO with a statistically valid sample for the whole country but it can produce some strange effects at local level. For example, in one of the offices visited, 16 accident decisions were selected, whilst in another none were.
- (32) Of the 'reasons for comment' two are what might be considered purely technical deficiencies in the adjudication process arising from administrative procedures. When making his final decision (and each sub-decision also) the adjudication officer is in effect free to choose only between a limited number of options (for example, to allow or disallow, to pay the benefit from a particular date, or for a specified period, etc). To ensure that he keeps within this range, the DHSS (and more recently OCAO) maintain a file of all possible decisions on all benefits, called the Adjudication Regulations (AR) Code. Each decision will have its individual Code number and be in the form of a 'model decision' giving a form of words which constitute a legally valid statement of the outcome of the adjudication officer's deliberations. The adjudication officer merely has to fill in certain gaps left blank for entries pertinent to the individual claim (such as name, date of commencement of award, amount of benefit, etc). So, if an adjudication officer uses a wrong model decision or quotes the wrong AR Code number in the case papers he is considered to have made an error in the adjudication process and the monitoring team will record a 'comment' of 'wrong model decision used'. Similarly, if the adjudication officer makes a mistake in filling in the appropriate spaces in a model decision a 'comment' of 'decision incomplete' is recorded.
- (33) In the second CAO report it is noted (without explanation) that the assessments of accuracy reported by the Regional monitoring

teams are consistently worse than those reported by the Southampton teams. One adjudication officer, however, suspected that Regional monitoring teams had become a little over-zealous in their monitoring in order to demonstrate that the loss of their advice role was a retrograde step.

"... standards have dropped drastically as the last oversight visit from RAO has shown. However, it may be that they are coming on a little keener now that they know we can't come to them for advice, and perhaps they are trying to show that they are needed." (Adjudication Officer, Office #12)

- (34) The rank correlation coefficient,  $r'$ , is calculated using the formula:

$$r' = 1 - \frac{6\sum d^2}{n(n^2 - 1)}$$

where  $d$  = the difference between the rankings of the same office for workload and 'comment' rate; and  
 $n$  = the number of offices (ie 12)

The result computed (0.7) indicates a strong correlation between the two values used to rank the local offices (Rowntree, 1981).

- (35) See Commissioners decisions R(I) 14/51 and R(I) 32/61.
- (36) This would have been received from the Nottingham Training Centre (NTC), which acts as a 'lead' centre for all DHSS training; the staff there not only prepare self-instruction packages for local office staff, but compile all course materials for the other training centres throughout the country. As part of the field-work for this study, I spent a week at NTC in the summer of 1986.
- (37) A 'fact' is defined in one of the handouts as:

"... a circumstance or occurrence, peculiar to the individual case, of which the truth has to be known, accepted or proved to the satisfaction of the statutory authorities."

Deciding the facts from the evidence involves firstly categorising it according to whether it is 'direct', (ie indisputable), 'circumstantial' or 'hearsay'. The example given on the distinctions between these was of a man falling off a ladder and breaking his toe, claiming an industrial accident. If there were several witnesses to the incident there is direct evidence that it took place; if there are no witnesses but someone passing by finds him prostrate at the foot of the ladder, there is circumstantial evidence that an accident took place; but if the man presents himself at a Casualty department of his local hospital and reports that he hurt his foot falling from a ladder, there is only hearsay evidence. Having categorised the evidence



different weights should be attached to it before the facts are decided. Greatest weight is given to direct evidence, medium weight to circumstantial, and low weight to hearsay evidence.

- (38) See para. 1.2 of the first report of the Chief Adjudication Officer (DHSS 1985e).
- (39) One office had produced its own series of letters which were as much part of their routine as the 'official' pro-formas printed by DHSS HQ. In another office, a letter which was regularly sent out to special hardship allowance claimants whose level of benefit was below the maximum rate, explained how the decision was reached and what earnings figures were used in the calculation, and asked for comments within seven days before the final, official decision was taken. (This was considered so effective in forestalling appeals that it was known as the 'the magic letter'.)
- (40) The Social Security (Adjudication) Regulations 1984 (SI 1984/451), regulations 9 and 10 (now regulations 10 and 11 of the Social Security (Adjudication) Regulations 1986 (SI 1986/2218) with one minor amendment).
- (41) However, because of the introduction of the new BI 118 forms, discussed earlier, the three Regions visited were operating a full check for a temporary period to ensure that the AMPs grasped the significance of the changes that had been made.
- (42) If a claimant appeals against his decision to an MAT he has the right to see copies of all the official forms used in his case. On medical report forms, however, an AMP can identify any 'harmful information' that he considers should not, in the interests of the claimant's health, be released in the event of an appeal. The Medical Officer will therefore try to ensure that no such harmful information slips through by returning the report for the doctor to reconsider. This is considered legitimate since it does not interfere with the independence of the AMP or medical board.
- (43) See DHSS (1986) Feasibility of Regional/Area Centres for Social Security Disability Benefits, Central Management Support report, (unpublished).

## Chapter 6 - Mobility Allowance

- (1) At the time of writing no beneficiaries had had their mobility allowance terminated under the age 75 rule. This is because the benefit was phased in over three years with the eldest claimants being the last to be admitted to the scheme in 1979. It is somewhat doubtful that the rule will be allowed to take effect because of political unpopularity in taking away from very old (and handicapped) people some £20+ from their weekly budget. A possible response might be to freeze the level of award at 75 so that it gradually decreases in value. Or the payment of mobility allowance might be extended to age 80 or 85 (or beyond) but this would only be postponing a difficult decision.

It might be thought that the 75 rule was always destined to be a doomed element of the legislation and the question raised of how it found its way into the Act in the first place. The answer, according to one civil servant involved in drafting the rules of the benefit, is that it was the only way of persuading the Treasury that mobility allowance was financially feasible.

- (2) The Social Security (Adjudication) Regulations 1984, SI 1984/451, regulation 53.
- (3) The sudden rise in the number of disallowances on age grounds is puzzling. One explanation is the cessation in 1985 of the 'brush-off' system operated by Mobility Allowance Unit clerical officers. This system was an administrative convenience; to save the effort of going through the formal adjudication process on 'over-age' claims. Claimants who were clearly ineligible because they were too old were sent a letter by a clerical officer (rather insensitively called a 'brush-off' letter) explaining that because the legislation was so clear there was no point in pursuing the claim and that they would take no further action unless the claimant specifically wanted a formal decision. This practice was identified by an OCAO inspection and stopped immediately as a strictly illegal process. Now every claimant receives a formal notification of the adjudication officer's decision.
- (4) The choice of a central unit rather than, say, the local office or Regional Office was not difficult to make. Firstly, the benefit was expected to be small scale (around 100,000) and hence the load distributed throughout the local office network would have been very small for each office restricting the accumulation of expertise and experience. Secondly, the experience of the comparatively new (since 1971) Attendance Allowance Unit served as a precedent for the central administration of a benefit; and furthermore, it was considered to be working successfully. And thirdly, with a new benefit there was a desire to monitor its administration very carefully, which could be achieved most

easily in one office. The choice was therefore virtually self-evident, no alternative proposal emerged as a serious contender.

- (5) See 'The Government's Expenditure Plans 1987-88 to 1989-90', Cm 56-II, HMSO, 1987
- (6) The Social Security (Adjudication) Regulations 1984, regulation 30.
- (7) Compared with many other social security benefits, mobility allowance is relatively straightforward. The medical conditions to be satisfied are few and consequently the assessment needed to decide them is correspondingly short and simple. At one point claimants' GPs were considered as possible suitable suppliers of medical assessments since they would have an intimate knowledge of a claimant's medical history and, therefore, be in the best position to advise on walking ability. However, the experience during the early years of the Attendance Allowance Board, who did use GPs in such a way for attendance allowance assessments, was a major influence in persuading the team to opt for an alternative arrangement. The Board had problems with poor reports, long delays, and simple refusal to cooperate from GPs.
- (8) The origins of the two tier appeal structure of mobility allowance appear to be in the initial intended arrangements for deciding the medical questions. It was proposed at one time that a Medical Board would consider a report from the claimant's GP and make a decision based on the reported clinical findings (ie a similar arrangement to attendance allowance where DHSS Medical Officers, delegated by the Attendance Allowance Board, make decisions based on a medical report supplied to them). But the idea of using GPs was not adopted and the current, alternative role for the Medical Boards was chosen.
- (9) Regulation 54 of Social Security (Adjudication) Regulations 1984 empowers adjudication officers to determine a medical question without obtaining a fresh medical report if there is some other evidence at their disposal that allows them to decide in the claimant's favour. This may be evidence relating to a previous claim for attendance allowance, sickness benefit, war disablement or the vehicle scheme. In practice this power is not used; claimants are referred automatically to an EMP.
- (10) The Social Security (Adjudication) Regulations 1984, regulation 55(2)(c) allow that a case may be referred to a Medical Board for an initial decision. M7 will advise whether or not this is an appropriate course of action.
- (11) EMPs were visited in Edinburgh, Glasgow, Leeds, Balham, and Reading.

- (12) One refused to give details of the walking test he used and was clearly of the opinion that knowledge of EMPs' methods of testing should not be widely known.
- (13) The use of the 100 yard criterion has had an unintended side-effect on the relevance of the legislation, in that the medical questions concerning the dangers to the claimant's health from walking (in regulation 3(1)(c)) have been rendered virtually obsolete, ie if walking is likely to be a health risk then the claimant is not usually fit enough to manage the standard 100 yards walking test. So, before these questions are even considered the claimant is very likely to have qualified as being virtually unable to walk and hence eligible for the benefit. There are however exceptions to this general observation: for example the angina sufferer who may be able to walk reasonably well but is advised not to because of the risk of possible further heart damage; but even these numbers are declining since as one baffled doctor told me, modern medical opinion is tending towards the view that gentle exercise and not complete inactivity is a more effective response to angina. Haemophiliacs are another group who are advised not to walk far (because of the danger of bleeding into the joints).
- (14) In R(M) 2/83 the Commissioner considered, inter alia, an MAT's finding that the claimant, a grossly mentally handicapped, epileptic child, incapable of speech, with poor eyesight and completely oblivious to personal danger, would not be able to benefit from enhanced facilities for locomotion due to her mental condition. The Commissioner concluded (in para. 11) that:
- "...the requirement that the claimant's condition should enable her from time to time to benefit from enhanced facilities for locomotion merited a liberal interpretation involving mental stimulation from being able to get out and about without the claimant herself necessarily appreciating that she was deriving mental benefit."
- (15) The use of Lay Scrutiny in place of M7 Medical Officers was adopted primarily in an attempt to speed up the decision-making process by eliminating the physical movement of casepapers around NFOCO (the Mobility Allowance Unit and M7 occupy premises several miles apart), and the inevitable delays that resulted from the scrutiny being carried out by part-time doctors. (Lay Scrutiny work continuously whilst the Medical Officers had to be booked on an ad hoc sessional basis according to the level of work.) And it did not escape the notice of the Mobility Allowance Unit management that EOs are considerably cheaper to employ than medical practitioners.
- (16) At the time the fieldwork was being carried out Lay Scrutiny were receiving MY22s on all initial claims for mobility allowance whilst M7 continued to scrutinise those for second and subsequent



claims, although the intention was that Lay Scrutiny should eventually do these also.

- (17) The Social Security (Adjudication) Regulations 1984, regulation 55(2)(c).
- (18) See R(M) 1/80. The ruling that 'hysterical' conditions do not fall within the scope of 'physical disablement' was recently upheld in the Court of Appeal (Harrison v Secretary of State for Social Services, Independent, 18 May 1987).
- (19) In R(M) 2/81 the claimant was successful, whilst in R(M) 1/83 the claimant nevertheless failed.
- (20) Lees v Secretary of State for Social Services [1985] 2 All ER 203. See also Ogus and Barendt, 1985, c14-15.
- (21) In one case, an EMP told of how he was telephoned by a Medical Officer at NICO about a case he had judged virtually unable to walk even though the claimant could manage a distance of 200 yards. He was 'reminded' that 100 yards was usually considered a reasonable test.
- (22) Consideration of decision-making by the MAT unfortunately lies outside the practical limits of this study but two sources, one above and one below the level of the tribunal, suggest that the claimant will not be judged by exactly the same standards by the MAT as by the EMP and the Medical Boards. One source is the EMPs themselves who receive copies of cases decided by an MAT on which they had supplied the medical report. The comment was made by a number of EMPs that they were at a loss to understand some of these decisions (which is not surprising if the tribunal was working to a different set of decision criteria). The second source is a Commissioner's decision, unreported, regarding a claimant who was born a spastic and who still suffered from spasticity of the leg muscles, in which the MAT findings are quoted in part; the MAT had said:

"He walked a distance of 50 yards at a moderate or uniform pace without any aid or support. He walked quite steadily and was able to avoid objects put in his path. There was no apparent discomfort or distress."

Accordingly, the MAT dismissed the appeal on the grounds that the claimant did not fulfil the requirements of the Mobility Allowance Regulations. Despite the fact that the Commissioner noted that the claimant's gait and speed were both unsteady (so much so that he was often mistaken in public for a drunk), the Commissioner decided that he could not intervene in the case as this was a medical question on which the MAT was the final authority unless an error of law had been made. This the Commissioner decided was not the case and, since he considered

that it was not an unreasonable decision for an MAT to reach, no breach of natural justice had arisen either. Hence, the case was dismissed as being outside the jurisdiction of the Commissioner. Notwithstanding the fact that the claim had been rejected by an adjudication officer and a Medical Board beforehand, the MAT clearly had not applied the same test that the vast majority of claimants are subject to in the course of their initial claims.

- (23) However, one region in the study distributed a one-page photocopy intended to elaborate or reassure on various points of detail; unobtrusively, well-down the list is the note that the Department usually considers 100 yards as a useful criterion for assessing whether a claimant is virtually unable to walk.
- (24) In 1984, at only 4% of appeals heard by SSATs was the claimant successful, and for 1985 the figure had fallen to 3%. The comparable success rates for claimants at MATs were 72% and 47% respectively (Social Security Statistics, 1985, p.126).
- (25) It was recognised by Oglesby that one of the objections to the use of the claimant's own GP to complete the medical report, which was one of his recommendations, was that he or she might be biased in favour of his or her own patient. However Oglesby considered that this would be offset by the advantages to be gained from the GP's intimate knowledge of the claimant's medical background.
- (26) It is ironic, therefore, that the DHSS advice on 'virtually unable to walk' goes far beyond the bounds envisaged by the architects of the legislation who intended, according to one source, that the phrase should bring within the scope of the benefit those individuals who whilst not totally unable to walk could only manage very small distances (ie just a few yards). In the case of mobility allowance, there is no doubt that Departmental influence has inadvertantly benefitted many thousands of claimants who were never intended to qualify as recipients.
- (27) In the first eight months of the operation of Lay Scrutiny, 73,082 MY22s were scrutinised. Of these, 4,144 (5.7%) needed further evidence. However, it is not clear how many of these were simple oversights (for example, failure to answer one of the questions) and how many were because the completed form still did not allow an opinion to be formed.
- (28) For example, the EMP could say that "I have recorded here that you walked 80 yards in 2 minutes, stopping once for about 10 seconds. You then stopped because you became breathless and tired. During the test you walked with a slight limp but your balance remained good throughout...etc." The claimant could then be asked if this was representative, ie whether this was a 'good' day or a 'bad' day, and whether he was still of the same

opinion as to his own ability that he stated before the test. This could be facilitated by a clearer format for the MY22 which would give a comprehensible (to the claimant) summary and a quantified (where possible) assessment of the walking test.

- (29) Support for such a change could be adduced from the Oglesby report which recommended that if GPs were to be the main suppliers of medical reports then it would not be reasonable to expect them to become sufficiently au fait with the law on mobility allowance to be able to give an opinion as to whether the legislative criteria are satisfied, they should instead just furnish a medical report minus an opinion.
- (30) Although the notion of independent adjudication proscribes any involvement from Departmental officials in decision-making, it was common practice until recently for medical board chairmen occasionally to seek advice from Regional Medical Officers. (This was most common where Medical Boarding Centres occupied the same building as the Regional SMO and his staff and the seeking of advice required no more effort than a walk down a corridor.) In addition to this, M7 Medical Officers, as scrutineers, were (at least until very recently) in the habit of contacting individual Board chairmen where some mistake appeared to have been made on the papers. This could often lead to the chairman altering the original decision (which indeed was usually the intention of M7 in the first place). This practice was well-established but came to the notice of a Commissioner who sharply condemned Departmental officials for intervening in the decision-making of one of the independent statutory authorities. The result has been that DHSS MOs now have no contact with Medical Board members qua members; however, they can still contact EMPs - it is not surprising therefore to find a sense of bewilderment amongst doctors who act in both capacities.



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APPENDIX - INTERVIEW SCHEDULES

A -Local Office adjudication officer

1. BIOGRAPHICAL DETAILS

2. ADJUDICATION

- 2.1 What is adjudication; how does it differ from discretion
- 2.2 Is disablement benefit adjudication different from, say, pensions adjudication
- 2.3 Is there any discretion in disablement benefit decision-making
- 2.4 How is adjudication different from Secretary of State decision-making
- 2.5 What qualities are required of the adjudication officer
- 2.6 What qualities are required of the supervisor
- 2.7 Is there a conflict between the two roles
- 2.8 What are the adjudication officer's priorities  
[PROMPT: suggest accuracy; speed]
- 2.9 Is there a trade-off between speed and accuracy
- 2.10 Is your local knowledge of any use to you in decision-making
- 2.11 What does being an independent statutory authority mean to you
- 2.12 Is your independence important to you

3. TRAINING

- 3.1 What adjudication training have you received
- 3.2 What is your opinion of your training

4. ADVICE

- 4.1 If you have a problem with a case, what do you do  
[PROMPT: explore use of people, IOG, Commissioner decisions]
- 4.2 How do you view the loss of the Regional advice role
- 4.3 How important is the advice in the IOG; do you always follow it
- 4.4 What is your experience of OCAO as a source of advice

5. MONITORING

- 5.1 How useful are monitoring team visits and reports
- 5.2 What long-term effect does the feedback from the monitoring system have
- 5.3 Does the monitoring system help to maintain and improve standards of adjudication

6. APPEALS

- 6.1 What action do you take on receipt of an appeal
- 6.2 Do you review many decisions
- 6.3 Is new evidence ever presented at an appeal hearing; how do you react
- 6.4 When making an initial decision on a claim, do you consider how an appeal tribunal would view the case

- 6.5 Do you 'defend' or 'advise' at a hearing
  - 6.6 How do you view the 'amicus curiae' role
  - 6.7 Should adjudication officers also act as presenting officers
  - 6.8 How do you compare appeals prepared by you with those prepared in other local offices that you may have to present
7. PARTICIPATION AND ACCOUNTABILITY
- 7.1 Do you think that appeals are sometimes made because the claimant has not understood the reason for a decision
  - 7.2 Do you think that claimants receive enough explanation about their claims
  - 7.3 What is your opinion of the written communications between the local office and the claimant
  - 7.4 Do you use any locally-produced forms; why
8. PROBLEM AREAS
- 8.1 Do industrial accidents present any particular difficulties
  - 8.2 Do prescribed diseases present any particular difficulties
  - 8.3 Do SHA cases present any particular difficulties
9. CENTRALISATION (London South adjudication officers)
- 9.1 What do you see as the pros and cons of centralisation
  - 9.2 Is there any effect on the standards of adjudication
  - 9.3 Is there any effect on the standards of information
  - 9.4 Does working in a centralised office have any effect on your career

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B - Local Office HEO

1. BACKGROUND
3. OFFICE ROLE
- 3.1 What are you trying to achieve as HEO; what are your aims and objectives; are these centrally, regionally or locally determined; are there separate goals for each benefit
  - 3.2 Do they conflict at all; is there a trade-off between speed and accuracy
  - 3.3 Do you set targets
  - 3.4 How useful are performance indicators; how do you use them within the office; are they used as 'league tables' between offices
  - 3.6 What is your opinion of DHSS devolution policy
  - 3.8 What is the impact of trade union activity in the office
  - 3.9 how has morale changed over, say, the last 5 years
  - 3.10 how feasible is the combined HEO/AO role
4. ADJUDICATION
- 4.1 What is adjudication; how is it different from Secretary of State decision-making

- 4.2 What is discretion, [PROMPT: Is the proposed Social Fund a viable compromise between discretion and adjudication]
- 4.6 Has the recent shift towards independence in social security decision-making had much impact
- 4.7 What qualities are needed for adjudication work
- 4.8 Are they different from those needed for supervisory work
- 4.9 Do adjudication and supervision sit happily together; what is the result of combining the two roles
- 4.11 Is there an internal staffing policy, [PROMPT: where do the best staff go; is there any kind of pecking order; where does disablement benefit fit in
- 4.13 What effect does the appeals system have on the local office
- 4.14 What effect on adjudication results from the policy of moving EOs to new duties every two years or so

5. PARTICIPATION AND ACCOUNTABILITY

- 5.1 Is the local office a welfare agency or a payment agency
- 5.2 Do claimants get enough explanation of what is happening with their claim and why certain decisions are made
- 5.3 Do you have any way of assessing the degree of claimant satisfaction with the service from your office

6. ADVICE CHANNELS

- 6.1 What resources do you use in advising adjudication officers [PROMPT: people, the IOG, Commissioner decisions etc]
- 6.2 What is your experience of using OCAO for advice
- 6.3 How do you view the loss of the Regional advice role
- 6.4 How important is the IOG as a source of advice; do you always comply with it
- 6.5 Are you an effective source of advice and guidance?

7. MONITORING

- 7.1 How do you view the results of last monitoring team visit; were there any differences between CB and Supp. Ben. If so, how would you explain these
- 7.2 Does the monitoring help to improve standards of adjudication; how do you view the emphasis on 'technical' accuracy

9. CENTRALISATION (London South only)

- 9.1 What do you consider the pros and cons of centralised offices
  - 9.2 Is there any effect on the standards of adjudication?
  - 9.3 Is there any effect on the career prospects of adjudication officers
  - 9.4 Is there any variation in the standards or approaches of different adjudication officers
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C - Local Office Manager

1. BACKGROUND

2. OFFICE PROFILE

- 2.1 Size of office; complement, CB/Supp. Ben split
- 2.2 Turnover
- 2.3 Geographical area served (especially for industrial disablement benefit?)
- 2.4 Industrial profile of area served by the local office
- 2.5 Level of unemployment
- 2.6 Welfare rights activity

3. OFFICE ROLE

- 3.1 What are you trying to achieve as Manager; what are your aims and objectives; are these centrally, regionally or locally determined; are there separate goals for each benefit
- 3.2 Do they conflict at all; is there a trade-off between speed and accuracy
- 3.3 Do you set targets
- 3.4 How useful are performance indicators; how do you use them within the office; are they used as 'league tables' between offices
- 3.6 What is your opinion of DHSS devolution policy
- 3.8 What is the impact of trade union activity in the office
- 3.9 how has morale changed over, say, the last 5 years
- 3.10 how feasible is the combined HEO/AO role
- 3.11 how important to you as Manager is fraud work

4. ADJUDICATION

- 4.1 What is adjudication; how is it different from Secretary of State decision-making
- 4.2 What is discretion, [PROMPT: Is the proposed Social Fund a viable compromise between discretion and adjudication]
- 4.3 How do you view the results of last monitoring team visit; were there any differences between CB and Supp. Ben. If so, how would you explain these
- 4.4 Does the monitoring help to improve standards of adjudication; how do you view the emphasis on 'technical' accuracy
- 4.6 Has the recent shift towards independence in social security decision-making had much impact
- 4.7 What qualities are needed for adjudication work
- 4.8 Are they different from those needed for supervisory work
- 4.9 Do adjudication and supervision sit happily together; what is the result of combining the two roles
- 4.11 Do you have an internal staffing policy, [PROMPT: where do the best staff go; is there any kind of pecking order; where does disablement benefit fit in
- 4.13 What effect does the appeals system have on the local office

- 4.14 What effect on adjudication results from the policy of moving EOs to new duties every two years or so
  - 5. PARTICIPATION AND ACCOUNTABILITY
    - 5.1 Is the local office a welfare agency or a payment agency
    - 5.2 Do claimants get enough explanation of what is happening with their claim and why certain decisions are made
    - 5.3 Do you have any way of assessing the degree of claimant satisfaction with the service from your office
  - 9. CENTRALISATION (London South only)
    - 9.1 What do you consider the pros and cons of centralised offices
    - 9.2 Is there any effect on the standards of adjudication
    - 9.3 Is there any effect on the career prospects of adjudication officers
    - 9.4 Is there any variation in the standards or approaches of different adjudication officers
- 

#### D - Local Office Disablement Clerk

- 1. BACKGROUND
- 2. OFFICE ROLE
  - 2.1 What is the function of the disablement benefit clerk
  - 2.2 What part do you play in the determination of industrial accident claims
  - 2.3 What part do you play in the determination of prescribed diseases claims [PROMPT: explore role on occupational deafness cases]
  - 2.4 What part do you play in the determination of SHA claims [PROMPT: explore role in decisions on suitable alternative employment, rates of benefit, re-assessment cases]
- 3. ADVICE
  - 3.1 Do you require advice very often
  - 3.2 Where do you seek advice from
- 4. PARTICIPATION AND ACCOUNTABILITY
  - 4.1 Do you explain to the claimant why you require certain information
  - 4.2 Do you explain the basis of decisions to claimants
  - 4.3 Would you say that the disablement benefit clerk can have any influence on the final decision of the adjudication officer

E - Adjudicating Medical Authorities

1. BACKGROUND

2. TRAINING

- 2.1 What adjudication training have you received
- 2.2 What is your opinion of your training

3. DISABLEMENT BENEFIT ADJUDICATION

- 3.1 What procedure do you follow when examining a claimant
- 3.2 Can you explain how you make a % assessment of disability  
[PROMPT: ascertain use of schedule 2 assessments]
- 3.3 Are there any particular types of case that cause problems
- 3.4 Can you explain how you make an SHA assessment
- 3.5 How do you view the introduction of one-doctor boards
- 3.6 How do you view the introduction of the new BI 118 forms

4. MOBILITY ALLOWANCE ADJUDICATION

- 4.1 What procedure do you follow when examining a claimant
- 4.2 What do you ask claimants to attempt as a walking test  
[PROMPT: if a distance is mentioned, eg 100 yards, ask why this criterion is used]
- 4.3 How do you assess whether a claimant is 'virtually unable to walk'
- 4.4 How do you interpret this phrase
- 4.5 How do you make decisions on the '12 month' rule
- 4.6 How do you make decisions on the 'able to benefit' rule
- 4.7 How do you view mobility allowance as a response to people with walking difficulties
- 4.8 How do you view the age cut-off points, ie 65 for eligibility, 75 for receipt of benefit

5. ADVICE

- 5.1 What do you do if you have a problem case
- 5.2 What sources of advice do you use [PROMPT: people, documents]
- 5.3 What use do you make of Commissioner decisions
- 5.4 What is your reaction to the Lees case?

6. MONITORING

- 6.1 Do you know what happens to your report after you submit it to the Regional Office
- 6.2 Are your reports checked at all
- 6.3 Do you receive any feedback from the Regional Office or NFOCO

7. APPEALS

- 7.1 What is your role if a claimant appeals against one of your decisions
- 7.2 When making an initial decision on a claim, do you consider how an appeal tribunal would view the case
- 7.3 Do you see the results from MATs; how do you use them



8. PARTICIPATION AND ACCOUNTABILITY

- 8.1 How much explanation do you give the claimant at the medical examination
- 8.2 Do you mention your % assessment
- 8.3 Does the claimant ever ask; how do you reply
- 8.4 How would you compare the doctor/patient relationship with that of the AMP/claimant

t See Chapter 6 on mobility allowance

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F - Lay Regional Office Staff

1. BACKGROUND

2. ORGANISATION

- 2.1 How many staff in the section
- 2.2 Briefly, what are there duties
- 2.3 Briefly, what are your duties

3. ADJUDICATION/MONITORING

- 3.1 What is adjudication; how does it differ from discretion
- 3.2 How do you view current standards of adjudication
- 3.3 What factors can you identify which contribute to the different standards produced by local offices
- 3.4 What are the most common adjudication deficiencies
- 3.5 How do you view the system of bi-annual visits
- 3.6 What contribution does the Regional Office make to the improvement of standards
- 3.7 How would you react to the criticism that you 'nit-pick'
- 3.8 After a visit to a local office what follow-up action is taken
- 3.9 In looking at standards of adjudication is the time taken to reach a decision of any relevance to your assessment
- 3.10 If an adjudication officer decides a case 'on the balance of probability' can anyone say that he is wrong

4. ADVICE

- 4.1 What advice role do you have
- 4.2 How do you view the loss of the Regional advice function
- 4.3 In practice, do you still provide advice to local offices

5. TRAINING

- 5.1 What is your involvement in adjudication training

9. CENTRALISATION (London South only)

- 9.1 What do you see as the pros and cons of centralisation
- 9.2 Is there any effect on the standards of adjudication



- 9.3 Is there any effect on the standards of information
  - 9.4 Does working in a centralised office have any effect on your career
- 

#### G - Regional Office Medical Staff

- 1. BACKGROUND
- 2. ORGANISATION
  - 2.1 How many staff in the section
  - 2.2 Briefly, what are there duties
  - 2.3 Briefly, what are your duties
  - 2.4 What is your relationship with HQ, NFCO, OCAO
- 3. ADJUDICATION
  - 3.1 How do you view the pros and cons of one and two-doctor boards
  - 3.2 How do you view the new BI 118 forms<sup>++</sup>
  - 3.3 How do you view the changes in the use of the BI 401 referral form [PROMPT: what is being done/has been done about checking old cases; refer to the Mobility Allowance special exercise<sup>+</sup>]
  - 3.4 How do you view the changes in definition of relevant loss of faculty, disability, and disablement<sup>++</sup> [PROMPT: does this mean that some previous decisions have been technically illegal]
- 4. TRAINING
  - 4.1 What is your involvement in training new AMPs/EMPs
  - 4.2 Is there a recruitment policy for AMPs/EMPs
- 5. ADVICE
  - 5.1 What advice role do you have
  - 5.2 How important is the Industrial Injuries Handbook; do you keep its use under review [PROMPT: mention how little it is used in practice]
  - 5.3 How are Commissioner decisions communicated to AMPs
- 6. MONITORING
  - 6.1 How do you assess standards of AMPs; are you satisfied; what action is taken to improve standards
  - 6.2 How do you view the reductions in pre- and post-board scrutiny
- 7. APPEALS
  - 7.1 What is your role in the appeal system
  - 7.2 What use is made of MAT results

9. MISCELLANEOUS

- 9.1 How do you view the Oglesby notion of Regional Disablement Centres
- 9.1 How do you view the Oglesby idea of using a claimant's own GP for medical reporting purposes

† See Chapter 6 on mobility allowance

†† See Chapter 5 on industrial disablement benefit

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H - Mobility Allowance Unit Adjudication and Lay Scrutiny Staff

1. BIOGRAPHICAL DETAILS

2. ADJUDICATION

- 2.1 What is adjudication; how does it differ from discretion
- 2.2 Is adjudication different from the Lay Scrutiny 'advisory' function
- 2.3 Is there any discretion in mobility allowance decision-making
- 2.4 How is adjudication different from Secretary of State decision-making
- 2.5 What qualities are required of the adjudication officer
- 2.6 What qualities are required of the supervisor
- 2.7 Is there a conflict between the two roles
- 2.8 What are the adjudication officer's priorities  
[PROMPT: suggest accuracy; speed]
- 2.9 Is there a trade-off between speed and accuracy
- 2.11 What does being an independent statutory authority mean to you
- 2.12 Is your independence important to you
- 2.13 How do you assess whether a claimant is 'virtually unable to walk'
- 2.14 How do you interpret this phrase
- 2.15 How do you make decisions on the '12 month' rule
- 2.16 How do you make decisions on the 'able to benefit' rule
- 2.17 What action do you take if you disagree with the medical advice on a claim

3. TRAINING

- 3.1 What adjudication training have you received
- 3.2 What is your opinion of your training

4. ADVICE

- 4.1 If you have a problem with a case, what do you do  
[PROMPT: explore use of people, IOG, Commissioner decisions]
- 4.3 How important is the advice in the IOG; do you always follow it
- 4.4 What is your experience of OCAO as a source of advice

5. MONITORING

- 5.1 How useful are monitoring team visits and reports
- 5.2 What long-term effect does the feedback from the monitoring system have
- 5.3 Does the monitoring system help to maintain and improve standards of adjudication

6. APPEALS

- 6.1 What action do you take on receipt of an appeal
- 6.2 Do you review many decisions
- 6.4 When making an initial decision on a claim, do you consider how an appeal tribunal would view the case

7. PARTICIPATION AND ACCOUNTABILITY

- 7.2 Do you think that claimants receive enough explanation about their claims
- 7.3 What is your opinion of the written communications between the Mobility Allowance Unit and the claimant

9. CENTRALISATION

- 9.1 What do you see as the pros and cons of centralisation
  - 9.2 Is there any effect on the standards of adjudication
  - 9.3 Is there any effect on the standards of information
  - 9.4 Does working in a centralised office have any effect on your career
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I - Mobility Allowance Unit Appeals and Review Staff

1. BACKGROUND

2. APPEALS

- 2.1 What action do you take on receipt of an appeal
  - 2.2 Do you review many decisions
  - 2.3 Is new evidence ever presented in a letter of appeal; how do you react
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J - Mobility Allowance Unit Managerial Staff

1. BIOGRAPHICAL DETAILS

2. OFFICE ROLE

- 2.1 What are you trying to achieve in your post; what are your aims and objectives
- 2.2 Do they conflict at all
- 2.3 Do you set targets
- 2.4 How useful are performance indicators; how do you utilise

them within the office

- 2.8 What is the impact of trade union activity in the office
- 2.9 How has morale changed over, say, the last 5 years
- 2.11 Are Medical Boards an anomaly in the adjudication system

3. ADJUDICATION

- 3.1 What is adjudication; how does it differ from discretion
- 3.2 Is mobility allowance adjudication different from, say, attendance allowance adjudication
- 3.3 Is there any discretion in mobility allowance decision-making
- 3.4 How is adjudication different from Secretary of State decision-making
- 3.5 What qualities are required of the adjudication officer
- 3.6 What qualities are required of the supervisor
- 3.7 Is there a conflict between the two roles
- 3.8 What are the adjudication officer's priorities  
[PROMPT: suggest accuracy; speed]
- 3.9 Is there a trade-off between speed and accuracy
- 3.10 How do you view the introduction of Lay Scrutiny

5. MONITORING

- 5.1 How useful are monitoring team visits and reports
- 5.2 What long-term effect does the feedback from the monitoring system have
- 5.3 Does the monitoring system help to maintain and improve standards of adjudication

7. PARTICIPATION AND ACCOUNTABILITY

- 7.2 Do you think that claimants receive enough explanation about their claims
- 7.3 What is your opinion of the written communications between the Mobility Allowance Unit and the claimant

9. CENTRALISATION

- 9.1 What do you see as the pros and cons of centralisation
- 9.2 Is there any effect on the standards of adjudication
- 9.3 Is there any effect on the standards of information
- 9.4 Does working in a centralised office have any effect on careers of Mobility Allowance Unit staff

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K - NFCO PAO Section

1. BACKGROUND

2. ORGANISATION

- 2.1 How many staff in the section
- 2.2 Briefly, what are their duties

- 2.3 Briefly, what are your duties
  - 2.4 What is your relationship with HQ, OCAO, ROs
  - 3. FUNCTION
    - 3.1 What is the function of the PAO Section
    - 3.2 How do you put these into effect
  - 4. ADJUDICATION
    - 4.1 What is adjudication. discretion, Secretary of State decision-making [PROMPT: use 'maybe' example from attendance allowance]
    - 4.2 Should the same evidence always produce the same decision: in theory; in practice
  - 5. MONITORING
    - 5.1 Are the present arrangements effective in maintaining and improving standards of adjudication; what does analysis of last 12 months reveal about changing standards
    - 5.5 In looking at standards of adjudication is the time taken to reach a decision of any relevance to your assessment
    - 5.8 If an adjudication officer decides a case 'on the balance of probability' can anyone say that he is wrong
    - 5.9 Is OCAO satisfied that the present sampling arrangements are satisfactory, [PROMPT: adjudication covers a wide range of questions from the simple to the highly complex, should not more attention be paid to difficult areas rather than pursue a rigid adherence to the demands of random sampling techniques]
    - 5.10 How do you react to the criticism that you 'nit-pick'
    - 5.11 Does monitoring help to improve standards of adjudication
  - 6. ADVICE
    - 6.1 What advice do you give on the 'medical questions', ie virtually unable to walk, the 12 months rule, the ability to benefit rule
    - 6.2 What advice do you give to the Lay Scrutiny section
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L - NFCO Principal Medical Officer (M7 Branch)

- 1. BACKGROUND
- 2. ORGANISATION
  - 2.1 How many staff in the section
  - 2.2 Briefly, what are there duties
  - 2.3 Briefly, what are your duties
  - 2.4 What is your relationship with HQ, OCAO, ROs

3. ADJUDICATION

- 3.1 How do you interpret 'virtually unable to walk'
- 3.2 Where did the 100 yards criterion originate from
- 3.2 How do EMPs know how to interpret 'virtually unable to walk'
- 3.3 How do you view the introduction of lay scrutiny
- 3.4 How do you view the Oglesby notion of using the claimant's own GP for completion of the MY22 form

4. TRAINING

- 4.1 what is your training function

5. ADVICE

- 5.1 What advice role do you have
- 5.2 How important is the Mobility Allowance leaflet; do you keep its use under review [PROMPT: mention how little it is used in practice]
- 5.3 How are Commissioner decisions communicated to AMPs

6. MONITORING

- 6.1 How do you assess standards of EMPs; are you satisfied; what action is taken to improve standards

7. APPEALS

- 7.1 What is the role of M7 in mobility allowance appeals
- 7.2 Could you explain the role of the Medical Board
- 7.3 How do you view their effectiveness
- 7.4 How would you react to the comment that Medical Boards are an anomaly in the adjudication system

9. MISCELLANEOUS

- 9.1 Why is there not a comparable monitoring/advice structure to the lay side
- 9.2 What involvement does M3 have in the production, design, and improvement of official forms

M - OCAO Lay Staff

1. BACKGROUND

2. INDEPENDENCE

- 2.1 What contact is maintained with DHSS HQ on
  - policy
  - interpretation of statute and case-law
  - advice to AOs
  - the annual report
- 2.2 Do the DHSS bring issues to the attention of OCAO, ie with the (implicit or explicit) intention of influencing OCAO behaviour
- 2.3 Could you cite any examples of DHSS attempts to influence OCAO
- 2.4 Do you have any 'informal' contacts with HQ; why
- 2.5 How is a DHSS role in training adjudication officers reconciled with independence

3. ADJUDICATION IN THEORY AND PRACTICE

- 3.1 What is adjudication. discretion, Secretary of State decision-making [PROMPT: use 'maybe' example from attendance allowance]
- 3.2 Should the same evidence always produce the same decision: in theory; in practice

4. SELECTION AND TRAINING

- 4.1 How are OCAO staff selected
- 4.2 How are OCAO staff trained

5. MONITORING

- 5.1 Are the present arrangements effective in maintaining and improving standards of adjudication; what does analysis of last 12 months reveal about changing standards
- 5.2 What use is made of monitoring reports of local offices submitted by Regional teams; is it only the statistics that are used
- 5.3 Were any 'different adjudication practices' found (para 2.4 of 1985 OCAO Report refers) identified in local offices; how did they affect standards
- 5.4 Are there any differences in (i) practices and (ii) standards between (a) different Regional monitoring teams, (eg in Scotland a 2-week visit is made, in the NE cases are called in. Any comments) (b) Regional monitoring teams and OCAO teams
- 5.5 In looking at standards of adjudication is the time taken to reach a decision of any relevance to your assessment
- 5.6 Is the notion of an 'adjudication comment' now finalised; how does OCAO ensure that it is used uniformly
- 5.7 Are there any plans to alter the categorisation of errors that was adopted in the first report; was it useful to you, to adjudication officers, and to the DHSS



- 5.8 If an adjudication officer decides a case 'on the balance of probability' can anyone say that he is wrong
  - 5.9 Is OCAO satisfied that the present sampling arrangements are satisfactory, [PROMPT: adjudication covers a wide range of questions from the simple to the highly complex, should not more attention be paid to difficult areas rather than pursue a rigid adherence to the demands of random sampling techniques]
  6. ADVICE
    - 6.1 Who advises the advisers; are any external sources of help used, [PROMPT: if solicitors are mentioned ask if they also advise the DHSS; if so how is this reconciled with an independent role]
    - 6.2 How is the quality of advice assessed, maintained and improved
  7. APPEALS TO THE COMMISSIONER
    - 7.1 What criteria are used in deciding whether to pursue a Secretary of State reference to the Commissioner, [PROMPT: if cost is mentioned what amount that is used; nb App 7, para 109 of 1985 Report refers]
  8. GENERAL/MISCELLANEOUS
    - 8.1 Why is there not a comparable monitoring/advice structure on the medical side
    - 8.2 Is the role of the HEO/AO a weakness in the structure of adjudication
    - 8.3 What involvement does OCAO have with SSATs and MATs; isn't OCAO only doing part of the job of keeping under review the adjudication system, [PROMPT: Para 1.2 of 1985 report notes that both first and second tier adjudication is the concern of the CAO. Refer to the frequent comments from AOs that SSATs often give strange/bad/poor decisions]
    - 8.4 Official forms are important, what involvement does OCAO have in their production, design, improvement. Are locally-produced forms discouraged; is there a potential advice role for OCAO here
  9. MOBILITY ALLOWANCE
    - 9.1 What is the relationship between OCAO and Lay Scrutiny in NFCO
  10. SPECIFIC ISSUES
    - 10.1 Reviews: why do they cause so many problems
    - 10.2 Occupational deafness: is too much expected of the non-technical adjudication officer
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N - OCAO Principal Medical Officer (M3 Branch)

1. BACKGROUND

2. ORGANISATION

- 2.1 How many staff in the section
- 2.2 Briefly, what are there duties
- 2.3 Briefly, what are your duties
- 2.4 What is your relationship with HQ, NFCO, ROs

3. ADJUDICATION

- 3.1 How do you view the pros and cons of one and two-doctor boards
- 3.2 How do you view the new BI 118 forms<sup>++</sup>
- 3.3 How do you view the changes in the use of the BI 401 referral form [PROMPT: what is being done/has been done about checking old cases; refer to the mobility allowance special exercise<sup>+</sup>]
- 3.4 How do you view the changes in definition of relevant loss of faculty, disability, and disablement<sup>++</sup> [PROMPT: does this mean that some previous decisions have been technically illegal]

4. TRAINING

- 4.1 What is your training function

5. ADVICE

- 5.1 What advice role do you have
- 5.2 How important is the Industrial Injuries Handbook; do you keep its use under review [PROMPT: mention how little it is used in practice]
- 5.3 How are Commissioner decisions communicated to AMPs

6. MONITORING

- 6.1 How do you assess standards of AMAs; are you satisfied; what action is taken to improve standards
- 6.2 How do you view the reductions in pre- and post-board scrutiny

7. APPEALS TO THE COMMISSIONER

- 7.1 What involvement do you have with Commissioner cases

8. INDEPENDENCE

- 8.1 OCAO is independent of the DHSS; what is the position of M3
- 8.2 What contact is maintained with DHSS HQ on
  - policy
  - interpretation of statute and case-law
  - advice to adjudication officers
  - the annual report (what is the rationale for letting them see a draft of the report)
- 8.3 Do the DHSS bring issues to the attention of OCAO, ie with the (implicit or explicit) intention of influencing OCAO

8.4 Could you cite any examples of DHSS attempts to influence OCAO

8.5 Do you have any 'informal' contacts with HQ; why

9. MISCELLANEOUS

9.1 Why is there not a comparable monitoring/advice structure to the lay side

9.2 What involvement does M3 have in the production, design, and improvement of official forms

† see Chapter 6 on Mobility Allowance

†† see Chapter 5 on Industrial Injuries

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O - Nottingham Training Centre

1. BACKGROUND

2. THE COURSE

2.1 what are the objectives of the course

2.2 what methods do you adopt

3. ADJUDICATION

What are your training objectives on the following:

3.1 'independence' and the adjudication officer's relationship with the DHSS

3.2 the difference between the adjudication officer and Secretary of State roles

3.3 how to use the IOG

3.4 how to treat the competing pressures of accuracy and speed

3.5 fraud prevention and detection

3.6 contact with claimants, and their representatives

3.7 giving explanations in case papers and to claimants

3.8 what a 'correct' decision means

3.9 how to handle unclear issues like 'good cause' etc

3.10 the possibility of two opposite decisions both being 'correct'

3.11 the use of advice channels

3.12 the approach to appeals; how to treat SSAT decisions; the 'amicus curiae' role